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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., guardian ad
litem of his unborn child

Petitioner,

-against-

V.C.,

Respondent.

VOLUME II OF PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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JOHN DOE, a fictititious name of a real person, individually; JOHN DOE, a fictitious name of a real person, guardian ad litem for his unborn infant child, Plaintiff, vs. JANE ROE, a fictitious name of a real person; et al	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO: MON-C-66-92 Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR RESTRAINTS

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PROCEDURAL HISTORY, NATURE OF THE ACTION AND STATEMENT OF FACTS

In this case, the Plaintiff, John Doe, seeks to preserve the life of his unborn child, was life is threatened by an abortion procedure scheduled for Wednesday, March 11, 1992. This is an abortion case which presents questions concerning the rights of a father, the rights of an unborn child, and the role of the powers of the State when called upon to intervene, and two natural parents who disagree on the fundamental question of whether their child should be permitted to live.

This case implicates some of the most precious rights and sacred obligations that we have as a people of the State of New Jersey and the United States of America. It presents questions concerning the sanctity of life and the moral course of our laws. It was once observed by Oliver Wendall Holmes that:

> "The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race.[1]"

It is not likely that these words have greater application than to the legal questions presented by this case, and its outcome may

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[1] Oliver Wendall Holmes, Jr., The Path of the Law, 10 Harvard Law Review 457 (1897).

well be the measure of what dignity is extended to the life of the people to whom it applies.

A.
BACKGROUND

This is a case in which an act of love between a man and his fiancee, and their subsequent disagreement concerning the future of the child they conceived, now forces the State of New Jersey, and perhaps our very culture, to choose a policy and constitutional principles which support the preservation and dignity of life or choose principles which destroy life itself. The considerations and legal principles implicated compel granting to the plaintiff the injunctive relief that he seeks in this case in order to preserve the life of his unborn child.

The plaintiff, John Doe, institutes this action seeking emergency relief for an injunction preventing his unborn child's mother from obtaining an abortion designed to terminate the life of the child. The Complaint was filed with the court on Monday, March 9, 1992 and the plaintiff seeks temporary restraints on an Order to Show Cause.

John Doe is not the real name of the plaintiff but is a fictitious name used to protect the identity of the child's mother and to

protect the child in the event the plaintiff succeeds in his application. It is the plaintiff's belief (and he makes simultaneous application for Orders protecting the identity of the parties because) it would be harmful for the child to know that the child's mother attempted to terminate his or her life.

John Doe is thirty-eight (38) years of age and met the defendant Jane Roe, thirty-two (32) in July of 1991. The two dated and in September of 1991 the plaintiff first proposed marriage to the defendant. Jane felt that she wasn't ready for marriage, but indicated to the plaintiff that it was something that she would consider. As the relationship continued and grew, in February of 1992, Jane suspected she was pregnant. She performed a test on her own that proved positive for pregnancy, and a repeat test in the presence of the plaintiff verified this fact.

On Monday, March 2, 1992, Jane was examined by a physician in Monmouth County who confirmed that she was pregnant with an eight-week year old unborn child. The plaintiff continuously expressed his support to her, proposed marriage again, and indicated that he would live up to all his obligations as father, whether or not she married him or felt capable of assisting in rearing the child. Jane indicated that she was unprepared for

marriage and on Wednesday, March 4, 1992 advised the plaintiff that she determined, with certainty, that she would seek an abortion. At that time she told the plaintiff that an abortion procedure was scheduled for the morning of Wednesday, March 11, 1992 at a hospital facility located in Monmouth County, New Jersey.

After the plaintiff concluded that he was unable to persuade Jane to preserve the life of the child, he sought and retained counsel on Saturday, March 7, 1992 and instituted this action on Monday morning, March 9, 1992.

B.

THE FACT THAT LIFE BEGINS AT CONCEPTION - THE COMPLETENESS OF THE UNBORN CHILD AS A UNIQUE HUMAN BEING IMMEDIATELY AFTER CONCEPTION

Eloquent and powerful testimony is offered (in the sworn testimony filed in support of plaintiff's application) concerning the fact that human life begins at conception and the child is a complete human being, unique in character immediately following conception. Relevant to these fact questions the Plaintiff produces

the testimony of Jerome LeJeune, M.D., Bernard Nathanson, M.D. and Russell Hittinger, Ph.D.[2]

Jerome LeJeune, M.D. is a world renowned geneticist who is currently a professor at the University of Paris, France. He has one of the largest consultation practices in the world for mentally retarded children with difficulty due to "chromosomal mistake" (examining over two thousand children each year and maintaining records of thirty thousand children over his lifetime). (I T36-10 to 24). Among the many of his life's achievements includes Dr. LeJeune's discovery of Down's Syndrome and its causes due to "an excess of genetic material" consisting of the extra chromosome, now known as number twenty-one. Dr. LeJeune has been credited with the first discovery of a chromosomal abnormality in man (I T39-7 to 25).

Dr. LeJeune and his colleagues have tried to understand the nature of every human being and why and how they are afflicted

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[2] References to the testimony of Dr. LeJeune, Dr. Nathanson and Dr. Hittinger, where referenced, pertain to the sworn testimony that has been submitted in support of the plaintiff's emergent application and transcript numbers relate to that testimony contained in the transcript provided, dated April 13, 1991. Page and line numbers pertain to that particular transcript.

by "constitutional difficulty" (I T36-25 to I T37-5) in an effort to find the means to correct the illnesses. As a result of Dr. LeJeune's prominence in the field of genetics, he was selected as a representative of France as a member of the United Nations Scientific Committee concerning the danger of atomic radiation. While serving on the Scientific Committee at the United Nations he also became Vice President of the Genetic Conference in Moscow. In addition, he was a member of the Pontifical Academy of Science and as a member of the special group that studied the damages of atomic war, was requested by Pope John Paul II to travel to Moscow to speak to Mr. Brezhnev on behalf of the Vatican (I T36-10 to I T39-4). He was the first to give a course on human genetics at California Institute of Technology.

Dr. LeJeune testified, based upon current scientific knowledge accepted within the scientific community, to the facts which support his conclusion that human life begins immediately upon conception when there is a complete, unique human being, a person.

Dr. Bernard Nathanson, an accomplished practicing obstetrician and gynecologist from New York City, testified concerning the medical evidence relevant to the completeness and

the independent nature of the child in utero. Dr. Nathanson was educated at Cornell University and McGill University Medical College in Montreal, Canada. He was Board Certified by the American Board of Obstetrics and Gynecology in 1960 and currently is an attending obstetrician and gynecologist at St. Vincent's Hospital Center, New York; St. Luke's Roosevelt Hospital, part of Columbia University College for Physicians and Surgeons; and New York Hospital Cornell Medical Center. In addition to being a member of most major medical associations, Dr. Nathanson has published numerous scientific articles and several books in the area of bio-ethics including fetal development, embryology and fetology. He lectures in these areas and has professorships at two universities (I T84-4 to I T87-12).

Dr. Nathanson probably has had more experience in abortion and abortion technology than anyone in the country, having been the Director of the largest abortion clinic in the United States for two years, his research and publication in medical literature, his scientific papers on the techniques of abortion, and his study of complications of abortion and related issues.

Dr. Nathanson testified to knowledge that has been gained since the time Roe v. Wade made abortions legal, including new

techniques for fetal surgery, new ultra sound advances which permit observation of the fetus in an animated fashion within the womb and the discovery of data concerning the immunization system of the mother and its factor in pregnancy. Dr. Nathanson testified that the fetus is a separate human being apart from the mother consistent with the observations of Dr. LeJeune that two separate individual human beings harmoniously share their lives together throughout the entire pregnancy. (See Summary of Judge Noonan at Da 17-11 to Da 20-2).

The record in this case submitted in support of the plaintiff's application for emergent injunctive relief supports the irrefutable and inescapable conclusion that life begins at conception, that the unborn child fathered by the plaintiff at the age of eight weeks is a human being, complete and separate in and of him and herself, is a member of the human race and is a person as a matter of fact and as a matter of law.

ARGUMENT

POINT I

RECENT DEVELOPMENTS AND DISCOVERIES IN SCIENCE AND MEDICINE SUPPORT THE IRREFUTABLE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. THE UNBORN CHILD IS A COMPLETE INDIVIDUAL MEMBER OF THE HUMAN RACE THROUGHOUT PREGNANCY.

Since the time the Supreme Court of the United States rendered its decision in 1973 in the case of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) the sciences of human genetics and medicine have made discoveries and obtained information that supports the irrefutable conclusion that the life of a human being commences at the moment of conception, and the individual's identity is fully developed, its genetic material and information is complete and there exists a person within any reasonable definition. Thereafter the child is nurtured and develops without any additional genetic information or material.

A.
THE SCIENCE OF GENETICS SUPPORTS THE CONCLUSION THAT THE LIFE OF AN INDIVIDUAL MEMBER OF THE HUMAN RACE BEGINS AT THE MOMENT OF CONCEPTION.

1. INTRODUCTION

The record[3] containing the authoritative testimony of Dr. Jerome LeJeune supports the conclusion that a complete identifiable member of the human race exists at the moment of conception, and is a person at the early stages of physical development.

All of the genetic information necessary and sufficient for a particular human being exists at the moment when the human life begins at conception. The life of each of us commences at the moment that the genetic information is complete and a unique individual is created. This event occurs when the head of the male sperm penetrates inside the female's ovum. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms. (I T42-7 to 24).

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[3] References to the testimony of Dr. LeJeune, Dr. Nathanson and Dr. Hittinger, where referenced, pertain to the sworn testimony that has been submitted in support of the plaintiff's emergent application and transcript numbers relate to that testimony contained in the transcript provided, dated April 13, 1991. Page and line numbers pertain to that particular transcript.

The once held belief that a mother contributes to the make up of the child following conception is now known with certainty to be false. Everything that is necessary to be a human being is present immediately after conception (I T47-14 to 20; I T48-13 to 20). Either the whole information is present for conception of a human being (and development to full stages of growth) at the moment after the entry of the sperm into the ovum or the genetic information is insufficient and no human being shall develop and conception will fail (I T48-21 to I T49-2; I T52-17 to 20).

The completeness of the human being immediately upon conception is such that there is a specificity of both the species and the complete identity of the individual member within the species. Not only is it possible to identify the resultant cell after conception as being human in nature, the individual identity or person is known and can be identified (I T57-2 to 23). In each instance, this marvelous phenomenon at the moment of fertilization (conception) is a pure novelty which has never occurred before in the history of mankind: a new constitution of a personally devised constitution for a particular person. This new constitution is complete in all of itself which is capable of being identified, its genetic material being capable of being read and the

makeup of chromosomes complete. We have, in short, a human being immediately after the moment of conception (I T58-1 to 12; I T59-18 to I T61-14).

2. THE PROCESS OF FERTILIZATION

Just prior to conception there are thousands of sperm swimming around one single female egg and through the process of nature, one sperm is elected which will penetrate the egg or ovum (I T43-14 to 16). There is in this process of fertilization an extraordinary device employed by nature to protect the privacy of the life of the person immediately upon conception. The right of privacy is actually written into the law of nature. The egg, which is a little sphere of one and one-half millimeters in diameter, is protected by a transparent membrane which completely covers the egg. This membrane is known as the zona pellucida. Immediately upon a sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed. Within micro seconds it becomes completely impenetrable by any other sperm (I T49-3 to I T50-5).

3. DNA AND THE SOURCE OF GENETIC INFORMATION

The necessary genetic information to create a human being is contained in DNA, a long thread molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put upon the point of a needle. These twenty-three pieces are chromosomes. The ovum also contains twenty-three little chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the genetic make up. The information provided by the male sperm is approximately fifty billion bytes of information. However, the information contained inside the egg is much greater, so much so that it is presently uncountable, so that the greatest computers cannot hold the amount of information which is inside one reproductive cell once fecundation occurs (I T46-25 to I T47-6). In his sworn testimony, Dr. LeJeune, in an effort to make the interaction of the biological components understandable, analogized the process to a tape recorder which plays music. He suggested that if one places a mini cassette on which the music of an artist such as Mozart is recorded and put it in a tape recorder, you experience the sound

of a symphony. The tape itself has no notes of music and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is being experienced by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg, which receives the tape band from the father and which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony) but information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information (I T44-6 to I T46-24).

4. THE RECENT DISCOVERY OF THE JEFFREY METHOD AND BAR CODE PERMITS IDENTIFICATION OF THE MEMBER OF THE HUMAN SPECIES IMMEDIATELY AFTER CONCEPTION AND SUPPORTS THE CONCLUSION THAT A HUMAN BEING EXISTS AT CONCEPTION.

Approximately four years prior to the trial in this matter a Englishman named Jeffrey made a discovery and developed a technique which has the capability of determining the identity of a particular human being. Jeffrey discovered that in part of the chromosomes the DNA is repetitive. It can be repeated as much as one hundred times, so if harm is caused to some of the segments, some of the sequence will provide the genetic function and the human being will survive. In his work, Jeffrey developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffrey's technique has proven that each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of the person being examined and is specific to the individual. That the identity of the person or the individualization of the member of the human race takes place at conception has been confirmed by the Jeffrey method (I T54-3 to I T56-20).

5. METHYLATION OF CYTOSINE REPRESENTS A VERY RECENT DISCOVERY WHICH EXPLAINS THE SCIENCE OF GENETICS PREVIOUSLY UNKNOWN. IT SUPPORTS THE CONCLUSION THAT THE HUMAN BEING IS A COMPLETE PERSON AT THE MOMENT OF CONCEPTION.

Totally unknown as recently as four years ago (and unavailable when Roe v. Wade was decided) was the process of Methylation of Cytosine (which is contained on a piece of DNA). What has been learned is that the DNA is even more sophisticated than previously suspected and the messages are written "letter by letter", piece by piece. There is basic information with indications that some information must be read immediately and some information must be read at a later time. What is meant by the Methylation process is that everything to make this particular human being exists at fertilization, but is not read at the instant of conception. This discovery was never expected ten years ago and never predicted: that, in fact, the father's genes underline instructions to immediately produce the membranes inside which the embryo will develop itself (its space capsule) and to make the placenta which is the body by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm not in the mother's egg. The male genetic material therefore builds the membranes which becomes the shelter and the placenta which is the food gathering system. The female information acting in concert with the male information provides the mechanism for the development of the parts of the

physical anatomy. All of this information and the sophisticated directive mechanisms is contained in the first cell. The significance of this information is that it was discovered that it is definitely ruled out that there can be a genetic constitution made from one parent only. It is not possible in an egg to put two pronuclei from the mother only. It will not be a human being. It can make "parts" such as skin, hair, teeth, some nervous cells, but not at all build a form and there will be no child. Essentially the same thing is true without the maternal nuclei. It will not form a human being. So it is absolutely required that, in the first cell, there be the DNA underlined by Methylation in the male way and the DNA Methylation in the female way for there to be a human being.

The extraordinary observation made is that the only cell in all of the life of a person in which those two Methylation systems from father and from mother are present together inside one cell is in the very first cell which gives life to a person. At each progressive stage of development this Methylation is erased and replaced and progressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned that the male way of "spelling" is obligatory for muscles so that

even in the female information which builds the muscles has to be underlined in the paternal way. This understanding contradicts any previous notions that fetal development occurs only through the mother. It is now clear that the child is a complete human being programmed for life from conception (I T62-21 to I T67-7).

6. THE SCIENCE OF GENETICS IRREFUTABLY CONCLUDES THAT A FERTILIZED EGG, IMMEDIATELY AFTER THE MOMENT OF CONCEPTION, IS A MEMBER OF THE HUMAN SPECIES, IS A HUMAN BEING AND IS A PERSON.

To conceptualize the person at the age of eight weeks post conception, Dr. LeJeune described what the child looks like. The child was only the size of a person's thumb measured from its head to it's "rump", one inch. Inside the human embryology the child can be visualized as a tiny human being with fingers, toes, a face and palm prints that you could read with a microscope. You would be able to see the child's sex. The child has a heart beat and with the mother there are two rhythms between her heart and the child's which are detectable. The child's heart beats about one hundred and forty times a minute if it is a boy and about one hundred and sixty times a minute if it is a girl. An abortion of an eight week only fetus kills a member of the human species (I T67-

23 to I T69-24). That there is completeness of the human being and its identity as a person from the moment of conception when its chromosomal make up is complete not only as to the species but as to the individual member of the human race is irrefutable. There exists a specificity of the uniqueness of a human being at the beginning of life, at fecundation, at fertilization at conception (I T50-13 to I T52-20).

B.

RECENT MEDICAL DISCOVERIES PROVE THAT THE CHILD IS A SEPARATE HUMAN BEING DISTINCT AND APART FROM THE MOTHER AT ALL PHASES OF PREGNANCY AND IS A PERSON WHO IS A MEMBER OF THE HUMAN RACE.

Current knowledge of modern medicine and its recent developments all support and are consistent with the conclusion that an individual member of the human race, one separate and apart from its mother, has a life immediately following conception.

1. THE ANATOMY OF THE FEMALE REPRODUCTIVE SYSTEM

The uterus, the key organ of the female reproductive system, is a pear shaped organ which has at its lower end the cervix. The cervix is a narrowing which resembles a "bottle neck". It contains within it a cavity and is positioned above the vagina which is the

lower most point of the female reproductive system (I T88-14 to 25).

At the top of the uterus on both sides are fallopian tubes. They function as a conduit for descending eggs from the mother's ovaries. The ovaries are located above and at the outer limits of the fallopian tubes on both sides. The function of the ovaries are to manufacture, or produce the female eggs or ova. The egg "pops" out of the ovary and is caught by the tube (I T89-1 to 8).

The fertilization of an egg actually takes place within one of the fallopian tubes itself, in an outer portion of it which is designated the "ampulla" (I T89-7 to 11).

2. THE DEVELOPMENT OF THE UNBORN CHILD IN THE FIRST EIGHT DAYS OF LIFE

During the first eight days following conception, the unborn child develops additional cells, descends from the fallopian tube, burrows into the lining of the uterus and there is an "interfacing" of the child and mother's circulation (I T89-14 to I T91-11).

It is while the child is in the early days of life that it (descriptively referred to as "the fertilized egg") begins to "divide" the numbered cells go from one to two, four, then eight and then sixteen. When the development of the child reaches the sixteenth

cell stage, the child is referred to by the biological term "morula" (I T89-14 to 25).

At this stage of development, the unborn child is approximately three days of age and proceeds into the uterus where it continues to divide and develop. By the sixth day, the early human being is actually in contact with the lining of the uterus which is known as the endometrium period as the division progresses and the baby attaches to the uterine wall. The developing human being is within the form of a cell mass referred to as a "blastocyst", which actually is in contact with the uterine wall. At this point there will shortly be a recognizable unborn child and the outer layer of cells, which is referred to as a trophoblast, will form the placenta (I T90-5 to 24).

As the blastocyst burrows into the lining of the uterus it erodes the maternal blood vessels and nexus begins to form between the mother and the child resulting in an "interface" between the mother's circulatory system and that of the child. It is at this stage of development, eight or nine days of age following fertilization, that the unborn child is detectable within the mother through normal testing methods (I T90-25 to I T91-15).

It is through the detection of a pregnancy hormone referred to as "beta sub unit HCG" that medical confirmation that there is a growing living human being within the maternal uterus is possible (I T91-14 to 22). During the first eight or nine days of the child's development this tiny member of the human race has exhausted its own stored up oxygen and nutrients. So at this age the bridge is established between the unborn baby and the mother and the baby begins to extract the nutrients and oxygen from her. In order to accomplish this link, the trophoblast (the outer layer around the blastocyst) actually scouts into the tissue of the uterus for blood vessels. The trophoblast has the power to open up maternal blood vessels which causes hemorrhaging around the baby. From the blood which is surrounding the child at that point the child begins to extract certain necessary nutrients, chemicals and even oxygen (I T92-1 to 18).

3. THE STAGES OF GROWTH OF THE UNBORN CHILD IS A SEAMLESS CONTINUUM FROM CONCEPTION TO BIRTH

The English language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. Consequently, there are terms to describe the particular "stages of growth". However, it was

emphasized at trial that it is important for one to understand that "stages of growth and development" of the new human being is really a "seamless continuum" (I T93-14 to 19).

Immediately upon conception the "fertilized egg" has been referred to as a zygot. At the age of three days the child has developed from a single cell to a sixteen cell individual termed "morula". The term "embryo" connotes the developing human being from the morulus stage to about the end of the eighth week following fertilization. The term "fetus" is used to describe the stage of the development of the human being from the end of the eighth week up to the time that the baby is actually delivered whatever the age of the child at birth (I T93-20 to I T94-9).

The terms zygot, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being. Development of the person from the moment of conception is "seamless" with continuing growth and aging of the person from the moment of conception (I T94-10 to 22).

4. TECHNOLOGICAL DEVELOPMENTS SINCE 1976 (THREE YEARS AFTER ROE V. WADE) HAS RESULTED IN GREATER KNOWLEDGE OF THE

NATURE OF THE UNBORN CHILD IN THE EARLY STAGES AND HAS PERMITTED SOPHISTICATED SURGERY ON CHILDREN ONLY FOUR AND FIVE MONTHS AFTER CONCEPTION.

There were crude ultrasound devices that were available in the early 1970's dating back to its development in the 1950's. These instruments permitted limited access to knowledge about the child during the early stages of growth following conception (I T95-3 to I T96-15).

In 1976 there was a major development in technology called "real time ultrasound". Whereas the old technology showed static pictures, the new technology actually created a motion picture which could detect not only movement but function, breathing, urination, swallowing and other functions of the human existence (I T96-16 to I T97-16). It became possible to trace the development of the unborn person from literally the very beginnings (at conception) all the way through the child's development up to its birth. This technology, currently in color, permits detection of such things as blood flow through a fetus and embryo. Doctors using the instrument can actually see the red blood on the screen itself as the vessels transmit the flow of blood through the child's circulation (I T97-4 to 16).

This level of visualization permits examination and diagnosis of the child's illnesses while in its mother's womb. Medicine can watch how the child functions including such intricate detail as the operation of the tiny little valves and the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at the developmental stages of four and five months. It was not until 1990 that the first book was published describing this sophisticated fetal surgery in which the mother is anesthetized, her abdomen surgically opened and the uterus incisioned. In these operations the amniotic fluid is suctioned out and the baby is actually removed from the mother's uterus while he or she is still attached by the umbilical cord. The baby's abdomen or chest (whatever bodily organ is defected) is incised surgically, repaired, and the child is replaced into the mother's uterus, the amniotic fluid put back around the baby, and the mother repaired. The child is able to proceed through the pregnancy to, at or near full term (I T97-18 to I T100-1). These operations are done at relatively early stages of development of the child (I T100-6 to 9).

In addition to the development, since Roe v. Wade, of the sophistication of ultrasound technology, medicine has developed the additional modality of the electronic fetal heart monitor which permits sophisticated investigation of the fetus. The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music (I T103-18 to I T105-13).

5. THE FUNCTIONING OF THE UNBORN CHILD AT EIGHT WEEKS OF AGE POST CONCEPTION

The child at eight weeks is a clearly recognizable human being even to the human eye. The child's brain has formed (the child's brain continues to form following normal birth all through childhood and adolescence). An important fact is that at eight weeks the brain is producing a substance, "substance P", which is the "chemical messenger for pain" (I T105-16 to I T106-3).

The child at the embryonic stage of development has arms, legs, fingers and toes which are separate and distinct. The child has a nose and an external ear and, as Dr. Nathanson put it, the child "is, in fact,...quite obviously one of us" (I T106-4 to 8).

The child, in every way, is a human being that is very small in physiological terms. The child functions the same way that an

adult human being functions. The child at that age excretes urine, and its heart beats regularly as it had been since the age of three weeks following conception. The blood is circulating and brain waves have been isolated and detected for children which are eight weeks following conception. The child essentially does everything that an adult human being does but on a smaller scale (I T106-9 to 24).

6. DEVELOPMENTS IN IMMUNOLOGY DEMONSTRATE THE CHILD IS ALWAYS, THROUGHOUT ITS DEVELOPMENT FROM THE DATE OF CONCEPTION, A SEPARATE AND DISTINCT PERSON FROM THE MOTHER.

The pre-born child is always a separate person from the child's mother. Circulations are always separate and they never mix. In fact, if they do mix it can be lethal to the baby and even to the mother (I T106-25 to I T107-6). Although the relationship is symbiotic and an important one, the child is a separate and distinct person and is not a part of the mother. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from its non-self, the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood cells actually recognize

parts of the mother as being the same human body to which it is a part. It also distinguishes a body that is not part of itself. If a foreign substance is put into a person's body the white blood cells will recognize it and immediately attack it in an "attempt to throw it out". The foreign body is not self. When the pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old following conception), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body (I T107-7 to I T108-18). Each one of us who were unborn babies have undergone this attack. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Graphically it stops the attack. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled which is the phenomenon that is referred to as "spontaneous miscarriages". A spontaneous miscarriage involves a person who is unborn but fails to survive

the attack by the mother's immune system (I T108-19 to I T109-14).

7. ONLY AFTER 1984, ELEVEN YEARS AFTER ROE V. WADE, DID MEDICINE UNDERSTAND THAT THE ABORTION OF THE UNBORN CHILD EVEN AT THE EARLY STAGES OF LIFE WITHIN THE MOTHER'S WOMB (INCLUDING AN EIGHT WEEK OLD CHILD) INVOLVES A BRUTAL, VIOLENT AND PAINFUL DEATH OF A HUMAN BEING

Mainly as a result of information learned during abortions that were performed after the Supreme Court decision in Roe v. Wade, it is now clear that the abortion of an unborn child, even at the early stages of the child's life following conception, involves a brutal, violent and painful death of a human being. It was not until 1984 that members of the medical profession began to document the abortion experience. In that year, Dr. Bernard Nathanson commissioned a doctor who was performing a legal abortion at a clinic to perform the abortion under ultrasound with the modern technology then available. During one day's work the commissioned doctor taped the ultrasound abortions of twenty-five to thirty human beings. A vivid depiction of one of the abortions was incorporated into a film entitled "The Silent Scream". As a result of the use of this technology in the taping of the abortion it

is documented that the unborn child is moving around in the womb in the embryonic fluid. We now know from this technology that the unborn child begins to move within the embryonic fluid at the age of eight weeks.

In the abortion process the doctor puts an instrument into the womb to dilate the cervix. The doctor breaks the water and the embryonic fluid is permitted to flow out. Then the doctor uses a suction apparatus into the uterus. On the film it can be seen that the baby moves away from the suction apparatus. After the baby moves from the apparatus, the suction is turned on and a tremendous negative force is used to pull the baby from its living quarters.

In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart.

In this specific abortion filmed in 1984, Dr. Nathanson explained that the head of the baby was too large to be suctioned out so the doctor had to take a metal instrument called a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around the baby's head and then close the forceps. The film reveals that the child's head is actually crushed in the

process. It was not until 1984 that there was a reliable documentation of what actually occurs in abortion (I T109-21 to I T111-24).

Dr. Nathanson explained that he himself performed or supervised seventy-five thousand abortions. He indicated that these abortions were performed when the technology was not available (before 1972). During an abortion a human being's life is terminated (I T112-12 to I T113-20).

It is now clear that as a matter of fact, the abortion of an unborn child in its mother's womb subjects a human being to "unimaginable agony" and it ends the life of a person in the most barbaric and bloody manner possible (I T111-25 to I T112-8).

The unborn child's death and the pain to which it is subjected is documented in the movie "The Silent Scream". In the film it can be seen that the mouth of the young unborn baby is open. It is described as a dramatic, an arresting moment - a heart stopping moment - because it can be detected that the child was grimacing and was evidencing the most unimaginable agony that one can envision (I T122 to I T123-8).

C.

A PERSON (AND THE WORD "PERSON") CAN ONLY BE DEFINED AS A HUMAN BEING.

EMPIRICAL DATA SUPPORTS THE IRREFUTABLE CONCLUSION THAT THE LIFE OF A HUMAN BEING, AND THEREFORE A PERSON, COMMENCES AT CONCEPTION.

What constitutes a person and the definition of the word person is important to the rights of the Defendant in this case as is discussed in the four subsequent points. We are now able to remove some of the confusion concerning this term and the question of when life begins, which confronted the Supreme Court in the case of Roe v. Wade, 410 U.S. 113 (1973). There is a correct definition of the term that can be universally accepted and when applied to the empirical data leaves the irrefutable conclusion that a human being during pregnancy is a person and is such from the beginning of his or her life at conception.

1. UNDERSTANDING THE NEED FOR A DEFINITION.

In part the rights of the Defendant-Appellant in this case, Alexander V. Loce, and the merits of his constitutional challenge and affirmative defenses he raised, are dependent upon the definition of a "person". Fourteenth Amendment rights are extended only to "persons". A fact question material to this case was resolved in favor of the Defendant-Appellant by the Municipal Court Judge, as trier of the facts. He found that the life of a

human being begins at conception and that the unborn child is a person. Whether unborn persons enjoy constitutional protection is a separate inquiry; but that inquiry cannot be entertained without first determining this initial one.

The great American philosopher, William James, medical doctor and professor at Harvard University, was fond of telling the story about one of his hunting trips. James was a member of a hunting club and one Friday evening when he arrived at the club's cabin he was greeted with great enthusiasm. The six hunters who had arrived before him were in a greatly heated debate. Three of the hunters had argued one conclusion in the debate and the other three drew an opposite one. All six were delighted to see the philosopher arrive to break the tie.

The six hunters were arguing a question about a squirrel that one of them had encountered. The squirrel had clung to a tree with all four limbs so that his stomach was facing the tree trunk. The hunter was on the opposite side of the tree so that he and the squirrel could not see each other. As the hunter slowly circled around the tree, the squirrel traveled in the same direction at the same pace so that the squirrel was able to keep the tree between himself and the hunter. At all moments, their chests faced each

other. When the hunter completely encircled the tree without ever being able to visualize the squirrel (and the two were always stomach to stomach) the question arose, "had the hunter walked around the squirrel?"

Three of the hunters engaged in the debate argued that the hunter had walked around the squirrel. The other three were convinced that the hunter never actually walked around the squirrel because they were always stomach facing stomach. All six were anxious to hear which way Dr. James would vote.

But James surprised all of them by announcing that they were actually in agreement. He explained they would realize their agreement once they agreed on the definition of the word "around". If on the one hand the term "around" would be defined as the hunter going from the front of the squirrel to the side of the squirrel to the back of him and then returning to his other side and back to the front, then clearly the hunter did <u>not</u> go "around" the squirrel. If on the other hand one were to define the term "around" as going from the east of the squirrel to the north of the squirrel to the west of him to the south of him back to the east of the squirrel, then clearly the hunter did go "around" the squirrel.

James told this story to illustrate the point that people sometimes debate a point on which they would be in agreement if they carefully defined their terms. James' point has importance to the dispute before the Court. In Roe, the Supreme Court found it was not possible to make the finding of when life begins at that point in human knowledge (1973). That Court impliedly recognized the relevance of when life began, but felt, on its record, it could not be ascertained. The absence of this fact influenced it's judgment concerning the definition to be applied to the word "person" found in the due process clause of the Fourteenth Amendment and therefore the outcome of the case. The fact that the plaintiff's unborn child is a person is important not only to the rights of this plaintiff, but to the entire law which applies to legal questions concerning abortion.

It should be rather clear that the word person can only have one relevant definition and what actually constitutes a person is a question of fact. Whether an unborn child is protected by the Fourteenth Amendment due process clause first requires a definition of the word "person". A failure to first define the term is the precise failure of which Dr. James warned. A discussion of whether there is an express permissible exclusion or inclusion of

members of the class of persons[4] is conditioned by the determination of whether the unborn child is in fact a person.

The term person can only be defined after examining the empirical data. The opposite is preconception and prejudgment. For instance, some have defined a person as a thinking rational animal (but this excludes those who are too young, too feeble, or incapacitated). Some might suggest independence from an adult as a necessary trait (but children rely upon others to a very advanced age). Some, as the Courts have pointed out, have suggested a person is one who survives live birth (this has been specifically rejected by the Supreme Court in Roe v. Wade, and we know that unborn children vary greatly in post conception age at birth). No definition is satisfying unless it includes all members of the human race. A definition therefore must be determined to decide whether the defendant was defending a person, or human life which was his right or obligation.

2. THE DEFINITION OF A PERSON

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[4] The United States Supreme Court found that the rights of an unborn child depended upon this specific discussion. Roe v. Wade, 410 U.S. at 156 - 159, 93 S.Ct. at 728 - 730.

The first definition of "person" offered by Webster's dictionary[5] is as follows: "1. an individual human being, especially as distinguished from a thing or lower animal; ... 3. (a) a living human body;". But the court is not bound by a dictionary. The Court's definition must reflect reality as revealed by the record and science.

It is clear that we can not limit the term by age, by development, by whether the human being thinks well, can speak, can see, can hear, or has any particular or all of the traits of a normal functioning human being may have when fully developed and healthy. The term "person" must refer to all members of the human race.[6] Age, or completeness of human development is irrelevant. The term cannot be limited to adults, adolescents,

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[5] Webster's Deluxe Unabridged Dictionary, Dorset and Baber, Second Edition, 1983 at 1338.

"human" is defined as "a human being" at page 883

"humanness" is defined as "human quality" at page 884

"humanity" is defined as:

1. the fact or quality of being human; the peculiar nature of man by which he is distinguished from other beings. at page 884

"human kind" is defined as "the human species"

[6] Whether the Fourteenth Amendment intends to exclude some persons from its protections is a separate inquiry altogether.

children, infants, fetus' of full term, fetus' of short term, fetus' and embryo's upon which modern medicine can now operate or may be even be able to operate on in the future. It is now known that the life of a human being does not commence when a fetus "moves" or is viable. Such a concept is antiquated. As the record below indicates modern technology can detect the movement of a human being that is less than eight weeks old following conception. Who can rule out the possibility that future technology will detect "movement" at an earlier age.

A person must be defined as a member of the human species, one who possesses the essence of a human being. This definition includes all persons with the common characteristics enjoyed by each of us: the complete makeup of that "being" necessary to be an adult person when fully developed. The event of surviving birth is not that which makes a being human.

Any other definition would create the confusion of the hunting club and endless unresolvable debate.[7] One is a human being

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[7] If some define a person as a human being who has survived birth, while others recognize that the birthing process is not what makes a being human, there shall be endless unresolved debate over the rights of the human being unborn.

when one has what is needed to be a person and that is when one has the essence of a human being. The empirical evidence proves that that moment is immediately after conception, when a complete biological make up of the human being exists. This individual is a member of the human race, is a human being and is therefore a "person". It is, of course, the youngest person, the most vulnerable person and the person in greatest dependency upon its mother for nutrients and oxygen. But that simply means that the newly conceived person is a person most in need of protection. It is illogical to suggest that the vulnerability of the weakest and least powerless human being is cause to leave it without protection because it needs protection the most. Dependency does not alter its essence or nature, or deny that it is indeed a human being.

3. THE TESTIMONY OF DR. FRANCIS RUSSELL HITTINGER

Dr. Francis Russell Hittinger is an expert in philosophy. His testimony is offered to assist in defining "person". He observed that there can not be personhood unless there is first human beingness (I T146 to 4). He also offers a definition which is perfectly consistent with that offered by Webster: "a person is a human being" (I T144-25).

He testified that to arrive at a definition of the word "person" would require a review of the empirical data such as that given by Dr. LeJeune and Dr. Nathanson. Philosophy cannot create definitions, because definitions depend upon the empirical data available. It can assist in organizing thinking, but must first defer to the facts (I T142-2 to I T143-24).

There is no reason to exclude any individual human being from the definition of person. Every human being at all stages of development must be included because at all times they are complete. Otherwise distinctions would be either arbitrary or based upon concepts which are not empirically verifiable (I T144-24 to I T149-15). Finally, Dr. Hittinger addresses the term "potential life" found in Roe v. Wade. As he points out there must first be human life for there to be potential. The phrase would be a contradiction or oxymoron unless it is defined and understood as actual life that has the power to exercise those kinds of abilities that are unique to the particular species. But in that context the references to potential life must refer to an existing human being, an existing person. One can only be a potential human being, have the power to exercise the traits associated with humanity, if one is already human (I T149-16 to I T152-4).

Based upon the empirical data currently available through recent developments in the science of genetics and medicine, it must be concluded that immediately following conception there is in being a member of the human race, a human being that is complete in genetic material at the earliest stages of development of human life. It is irrefutable that life begins at conception and that the unborn child is a human being throughout pregnancy. All human beings are persons. As a matter of fact, and as a matter of definition, a human being is a person, and the unborn child immediately following conception is in fact a person.

POINT II

THE UNBORN CHILD ENJOYS CONSTITUTIONAL PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I SECTION I OF THE CONSTITUTION OF THE STATE OF NEW JERSEY. PRONOUNCEMENTS TO THE CONTRARY FOUND IN ROE V. WADE HAVE BEEN TOTALLY UNDERMINED BY SUBSEQUENT DECISIONS AND EVENTS AND IS NO LONGER VIABLE LAW.

The recent developments in the science of genetics and medicine, together with recent changes in the law resulting in the modification of the United States Supreme Court decision in Roe v. Wade, 410 U.S. 959, 93 S.Ct. 1409, support the conclusion that as a matter of law the unborn child is a person that enjoys protection under the due process clause of the Fourteenth Amendment of the United States Constitution[8]. The unborn child also enjoys constitutional protection under Article I, paragraph I of the New Jersey Constitution of 1947[9].

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[8] That clause reads "nor shall any State deprive any person of life, liberty or property without due process of law".

[9] Article I, paragraph I of New Jersey State Constitution reads in pertinent part "all persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and

A.
THE INHERENT FLAWS AND THE RECENT MODIFICATIONS OF ROE V. WADE

In the United States Supreme Court decision of Roe v. Wade,[10] the Court concluded that "...the word 'person', as used in the Fourteenth Amendment, does not include the unborn". 410 U.S. at 158, 93 S.Ct. at 729. That legal conclusion was based upon: (1) a series of false assumptions now known to be such; (2) logical incongruities; and (3) legal pronouncements which have since been rejected by the current United States Supreme Court. As a result, this portion of the Court's holding in Roe v. Wade, supra. is no longer viable law.[11]

1. THE FALSE ASSUMPTIONS

The Roe Court neither possessed a record before it such as the one in this case, nor did it have the benefit of the relatively recent discoveries of modern genetics and science, which bear directly upon the question of when the life of a human being begins.

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defending life and liberty,..."

[10] See discussion at 410 U.S. 156 - 159, 93 S.Ct. 728 - 730.

[11] Part of the Court's holding which, involving the privacy right of a mother, remains law at this time.

Consequently, the Roe Court operated on a fundamentally false assumption: that one could not ascertain when life began (410 U.S. at 159-161, 93 S.Ct. 730, 731).

It is clear from the record in this case that there is only one conclusion that can be drawn: life begins at conception. However, the 1973 United States Supreme Court made two essential statements which no longer can be taken as accurate. First, the Court stated:

> "When those trained in respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

The first difficulty with this statement is that consensus is not needed. There is only one correct answer and when those with sufficient expertise are able to provide the empirical data necessary for a trier of fact to reach a conclusion a court is not free to absolve itself of the obligation of making a finding whatever the legal consequences. Second, it can no longer be said that this statement is true. Responsible, knowledgeable experts cannot credibly disagree with the testimony and findings of the Municipal Court judge in this case. To the extent that the statement of the Roe Court may have been true because of the "point in the

development of man's knowledge" in 1973, the statement is no longer true today.

The Roe Court made an additional statement which we now know to be false. With respect to the position that as a matter of fact the existence of life begins from the moment of conception, the Court stated:

> "Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event..."

The record in this case irrefutably contradicts these two false assumptions relied upon by the United States Supreme Court in 1973 in Roe v. Wade.

2. THE LOGICAL INCONSISTENCIES

(a) DEFINITION OF A "PERSON"

When the State of Texas argued in Roe v. Wade that the unborn child was a person within the meaning of the Fourteenth Amendment, the Supreme Court of the United States agreed that if "personhood is established, ... the fetus' right to life would then be guaranteed specifically by the Amendment." In rejecting the contention that the fetus was a person, the Court referred to the Fourteenth Amendment due process clause. Roe v. Wade, 410

U.S. at 157-160, 93S.Ct. at 729, 730. In arriving at the ruling the Court, as stated, did not understand when life began. This surely influenced its judgment. But in addition, the Court articulated a series of logical incongruities which seriously undermines its decision as precedent and partly accounts for Roe's subsequent and substantial modification.

The Roe Court ruled that the unborn is unprotected because there is no evidence within the constitutional document itself to support the conclusion that the framers intended to define "person" to include the unborn child (See, 410 U.S. at 156-159, 93 S.Ct. 728-730). The problems with this approach are multiple. Firstly, if the level and depth of knowledge of modern science forces us to recognize a broader definition of the word person we could not possibly expect to find such a definition in a document that was drawn in the Eighteenth Century. Secondly, it is illogical to conclude that because a definition is not contained within the document it was the intent to exclude any member of the human race from its protection.

The Court offered no expressly stated intention to exclude any members of the class of persons. Because past cases only involve persons after birth does not really indicate anything about whether

persons, found to be such before birth, as a matter of fact, are intended to be excluded. The clauses of the constitution referred to by the Roe Court do not provide evidence of intent to exclude an unborn child from due process protection.[12]

None of the court's considerations even address the question of whether the due process clause should apply. There is a total absence of such a discussion. Which brings us to a third and most ironic point. It would seem rather inappropriate to make an important determination based upon a failure to find intent to include the unborn in a privacy rights case. After all, the particular right, the right to privacy, under discussion is conceded by the Court to never be explicitly mentioned within the Constitution, 410 U.S. at 152, 93 S.Ct. at 726.

What this means is that the Court finds a right of privacy under the Constitution which is not found anywhere within it, but they deny the right of privacy to some members of the human race

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[12] It would seem obvious that no references would be found to an unborn child in clauses listing the qualifications for president, extradition, voting rights, fugitive slave clauses, and who qualifies for the Senate and Congress. These clauses, by their nature would not reflect upon the Fourteenth Amendment. See Roe vs. Wade, 410 U.S. at 157, 93 S.Ct. at 729.

precisely because they are unable to find a clear statement of the group of persons to whom this very right would extend.

This inconsistency leads to the inference that the Court was not sure that it was dealing with a human being at all. The resultant creation of a trimester system in which the State had an interest in the life of the unborn in the third trimester, but not the first two, reflects the ambivalence resultant from their need to protect what was obviously a human life on the one hand, but their lack of knowledge of when it began on the other.

Thus the fourth incongruity: if there was no human life there can not be any real state interest (see, Griswold v. Connecticut, 389 U.S. at 484, 485, 85 S.Ct. at 1681-1682 (1965)) yet they found an interest part of the time, not most. This particular contradiction has led to the modification of Roe discussed below.

In addition, the Court's reliance upon attitudes of the Nineteenth Century when knowledge such as that found in this record was unavailable seems misplaced. The United States Supreme Court had reserved to itself broad discretion in delineating the intent of the constitution and created a line of cases which provided a right of personal privacy, or guarantee of certain areas or zones of privacy. It was an expansive concept that developed

rapidly in the seven or eight years immediately preceding Roe v. Wade in cases such as Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247 (1969); Terry v. Ohio, 392 U.S. 1, 8-9, 80 S.Ct. 1868, 1872-1873 (1968); Katz v. United States 389 U.S. 347, 350, 88 S.Ct. 507, 510 (1967), and of course, Griswold v. Connecticut, 381 U.S. at 484, 485, 85 S.Ct. at 1681-1682 (1965). In short, the Court that has the power and the will to create rights through their recognition in interpreting the Constitution is the very same, in fact the only Court, that would be the arbiter of the question to whom those same rights apply. It is inconsistent (and irresponsible) to suggest that the Court has the ability to define the privacy right that is not expressly stated, but cannot define the group to whom the rights apply because they do not find the definition within the Constitution itself (and fail to explain why some should be excluded).

Finally, there is a logical incongruity in the Supreme Court opinion in Roe v. Wade found in footnote fifty-four, 410 U.S. 157, 158, 93 S.Ct. at 729. The Court claimed that if the fetus enjoyed Constitutional protection then the Texas statute before it contained an inconsistency because it provided exceptions permitting an abortion for the purpose of saving the life of the mother. But this

is not an inconsistency, and the Court's statements concerning this provision of the statute is incorrect. The fact that the unborn child would enjoy protection under the Fourteenth Amendment does not mean that the child's right is absolute because the mother has a competing right. If the Court recognized a privacy right of a mother to make decisions about her own health and about her own life, surely a state would have the power to balance the considerations and permit a mother to abort a child if the mother's life depended on that very act. In fact, within the Roe v. Wade decision itself, the Court provides a considerable explanation why the mother's right to privacy under the Fourteenth Amendment is not absolute and that it is subject to other state interests, specifically the state's interest in protecting "potential life" (see discussion at 410 U.S. at 159, 93 S.Ct. at 730; 410 U.S. at 155, 93 S.Ct. at 728). The Court specifically stated:

> "we, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against an important state interests in regulation", 410 U.S. at 154, 93 S.Ct. at 727.

Why would the right of an unborn child not be limited where the life of its mother is at stake? Even the right to life is limited. See, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909.

(b) THE COURT'S FAILURES IN DEFINING THE PRIVACY RIGHT OF THE MOTHER

The Court's discussion in Roe v. Wade concerning the nature and scope of the privacy right as it applies to a women's decision concerning abortion contains dramatic incongruities. The right to privacy of which the Court spoke dealt with a zone of privacy that was set forth in cases concerning marital intimacy, procreation, education, and matters of family life that were personal and "implicit in concept of ordered liberty" 410 U.S. at 152, 153, 93 S.Ct. at 726, 727. Without any discussion for the basis for the conclusion the Court leaps from the right to use contraception devices in Griswold, supra to the conclusion that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" 410 U.S. at 153, 93 S.Ct. at 727. It does not define the scope of this right. That is to say, it does not address the question of whether, in the absence of competing rights, it is absolute. It does not follow that a right of privacy which includes decisions by couples to prevent

pregnancy, Griswold v. Connecticut, 381 U.S. at 484 - 485, 85 S.Ct. at 1681 -1682, supports the conclusion that a woman has the right to terminate the life of another human being simply because the human being is dependent upon her.

The Court lists four harms that could befall the mother to justify the conclusion that the privacy right would include the decision to terminate a pregnancy. The first of these, concerns the health and life of the mother herself. To the extent that one could say personal judgments about a mother's health where a mother's life is in danger, is a decision that is logically included in the right of privacy as set forth in the prior case law is undoubtedly sound. It is based upon the right of the mother not only in judgments of privacy, but to her fundamental right of life itself.

However, other concerns about pregnancy do not justify the act of aborting a child based upon the right of privacy. We only need examine the other harms listed by the Roe Court: 1. maternity or additional offspring may force upon a woman a distressful life and future; 2. mental and physical health may be taxed by child care; 3. distress associated with an unwanted child; and 4. additional difficulties and continuing stigma of unwed motherhood.

That these are legitimate concerns that implicate the right of privacy there is no doubt. We believe that a mother carrying a child conceived out of wedlock is entitled to compassion and a measure of understanding. Society should support all of her legitimate concerns and any effort necessary to assist her in keeping her and her child together, if that is the course she chooses. But the concerns listed by the Roe court are reasons to avoid pregnancy, and the state would not have a compelling interest to interfere with the private choice of a woman or a couple to take steps to prevent pregnancy. The right of a woman and couples to prevent pregnancies, however, was well established. See, Griswold, supra. The right to use contraceptives to prevent pregnancy is sufficient to satisfy this right. The four reasons noted above are not reasons to permit the destruction of the life of a human being where the mother or couple decline to exercise their right to use contraceptives granted them under Griswold.

In addition, if these were truly reasons to abort a child, then the natural father would have a right to demand an abortion. All of these inconveniences and embarrassments are experienced by him when the law calls upon him to meet his obligations, even where the child is born out of wedlock.

It also cannot be said that there is anything private about the mother's decision. Unlike the activity found in the other privacy cases, an abortion does not take place in the privacy of one's home, but in a clinic that has a staff. The necessary degree of involvement by general society is too great to suggest that there is no interest of the populous in the conduct. We are all implicated in the abortion activity when we are forced to create the medical support to see that it is safe. The people of the state give material assistance to the act as licensors and regulators of the doctors, nurses and clinics. In short, it is not the kind of conduct that could be said to be privately conducted like the other types of activity traditionally protected by the privacy right.

Further, it should be added, why would one expect that they could take the life of their own child and others in society would assist in the endeavor just because the mother or the couple seek to avoid the embarrassment or stigma they should anticipate is the natural consequence of their failure to exercise their Fourteenth Amendment Griswold rights? At some point the question of the reasonableness of the expectation is a material consideration in determining if the expectation of privacy is constitutionally

protected. See, California v. Greenwood, 108 S.Ct. 1625, 1628 (1988).

It is insufficient to say, as the Roe Court did, that we must reject the argument that one has the right to do whatever one wants with their bodies. More to the point, as the record in this case finally concludes, the body she seeks to expel is not her own.

The combination of a woman's and a couple's Griswold rights to prevent pregnancy and the privacy rights of a mother to seek and obtain an abortion when her own life is at stake (making it a true medical decision) would seem to be reasonably sufficient to meet the privacy concerns listed by the Court. There is one other concern we might add. Does a woman have a legitimate privacy right to involve the decision of abortion in cases where she has been raped? Where there is a true rape, the answer is probably yes. After all, the Griswold privacy rights have been denied her. At this point, however, there is no need to discuss whether competing interests with that of the mother under such circumstances would outweigh hers.

3. THE MOST IMPORTANT ASPECTS OF ROE V. WADE AS LEGAL PRECEDENT HAVE BEEN MODIFIED AND FUNCTIONALLY REVERSED IN MOST AREAS.

The heart of the Supreme Court's determination in Roe v. Wade is that there is a point in a pregnancy when a state has no compelling interest to either regulate or prohibit abortion where either is based upon the state's concerns for the life of the child:

> "With respect to the state's important and legitimate interest in potential life the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb".410 U.S.at 163, 93 S.Ct.at 732.

The Roe Court therefore acknowledged a legitimate and compelling state interest in preserving the life of the child in the third trimester, but denied such an interest prior to that time. The reasoning for the distinction was that prior to the third trimester the child is in greater dependence upon mother. This is the reverse theory of all fundamental constitutional protection. Usually the Courts are interested in protecting those who are least able to assert themselves. E.g., Santotsky v. Kraemer, 455 U.S. 745, 102 S.Ct. 1388 (1982). To say that a state has no interest in protecting the life of those who most need the protection is inconsistent with modern American jurisprudential principles. It is a particularly cruel irony that a natural parent, who is discharged in law and in nature to be an individual with the greatest

obligations for the safety, health and welfare of a child, would become the only one with the power to destroy the child's life.

The trimester system and the state's lack of a compelling state interest in potential life prior to the third trimester has been rejected in subsequent opinions. In Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) the plurality wrote:

> "...we do not see why the state's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability". 109 S.Ct. at 3057.

The Court cited the dissent in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S.Ct. 2169 (1986), with approval:

> "The state's interest, if compelling after viability, is equally compelling before viability." Thornburgh 476 U.S. at 794, 106 S.Ct. at 2197.

The plurality in Webster was written by Justice Rehnquist, joined in by Justices Kennedy and White. Justice Scalia wrote a concurring opinion which supports their conclusion. Justice O'Connor on more than one prior occasion concurred in the statement found in Webster. In 1983 she dissented in the case of Akron v. Akron Center for Reproductive Services, 462 U.S. 416,

(1983) in which she wrote that the trimester system "cannot be supported as a legitimate cr useful framework" Akron, supra at 454 (O'Connor, J. dissenting). In her dissent in Thornburgh v. American College of Obstetricians and Gynecologists, supra, Justice O'Connor expressed precisely the same sentiment as set forth in the Webster plurality:

> "I will remain of the views expressed in my dissent in Akron. The state has compelling interests in insuring maternal health and in the protecting of protecting of human life throughout pregnancy."

Thus, the most important principle of Roe v. Wade has been subsequently deleted and effectively reverses the case.

The inherit flaws in the rationale of Roe has resulted in its demise as legal authority. The Webster statement simply points out one of them: if there is potential life of a nature that a state has a compelling interest in protecting it at any time during pregnancy, then the interest is throughout it. The cause of the conflict rests with the Roe Court's inability to recognize when life began. The Roe Court knew there was life before actual birth and it could be protected, but failed to recognize life that is obviously human. Such reasoning was bound to be later rejected.

In part, the rejection of the Roe viability line reflects the lack of respect the decision has always received. It has been a divisive force in our society for almost twenty years. It is divisive because it defies the human spirit, denies human nature, creates injustice, and denigrates the dignity of life.

As long as there are those who respect human life, those who love justice and those who possess the vitality of the human spirit, Roe v. Wade shall continue to receive little respect.

B.

THE STATE HAS A COMPELLING STATE INTEREST THROUGHOUT PREGNANCY TO PROTECT THE LIFE OF THE UNBORN CHILD. THE SUPREME COURT OF THE UNITED STATES HAS INFERENTIALLY FOUND THAT THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION.

Between the dissenting opinion of Justice Scalia in Webster 109 S.Ct. at 3064, Justice O'Connor's dissents in Akron, supra and Thornbourgh, and with the plurality opinion of the Court in Webster announced by Chief Justice Rehnquist and joined in by Justices Kennedy and White, the Roe trimester framework has been discarded. But more significantly, it is clear that the nature of the State's interest is compelling before "viability" and "throughout pregnancy" 109 S.Ct. at 3057.

The plurality in Webster cited with favor the statement by Justice O'Connor in her dissent in the Thornbourgh case that "a state has a compelling interest in insuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'". See Webster, 109 S.Ct. at 3057.

The Webster Court rejected the Roe Court's contentions concerning the nature of the state's interest prior to "viability". The difference between the two views, it may be inferred, rests with a difference in the views of the nature of the child itself. For a different interest to exist before and after "viability" would require a difference in the nature of the life. When the Webster Court found that the state's interest must be the same, it was because they found that the "potential life" subject to the interest was the same. The nature of the unborn child after viability in Roe was the same nature before viability in Webster.

The difference is primarily attributable to the Roe Court's confusion over when life begins and the true nature of the early human being. The refusal by the court to clearly define what they were dealing with led to divisiveness and error.

Whatever the undefined life the Roe Court believed it was dealing with that justified state protection was now found to exist

throughout pregnancy, and, effectively the Webster Court has found that the life of a human being starts at conception. This conclusion must be reached for a number of reasons.

First, the Roe Court held the state had no regulatory interest in unborn life prior to viability because it believed that life's commencement was speculative. A state's interest in life required a clear existence of life. Webster's pronouncement that the state's interest was compelling from conception implied, therefore, recognition of life's commencement, actually and legally, at conception. Second, it should be observed that the Roe Court never denied that the unborn child, after viability, was a human being, a person. The Court confined its discussion of personhood to its relevance to the fourteenth amendment and its pronouncement that there was no constitutional protection. Third, by express statements and inference the Roe Court acknowledged that after viability there was human life concerning which a state's interest was compelling. The description of the unborn child's capability to live independent of the mother was an express acknowledgment of the child's personhood. The use, by the Roe Court, of the term potential does not infer non-being. The express statement supports the

conclusion that it is a being, a person in being. That the third trimester unborn child is a human being was self evident even to the Roe Court.

The word "potential" did not imply non-life. The Court ruled that the state had no interest in preserving non-life, while it had "potential" to be life in Griswold v. Connecticut, 381 U.S. 485 (1965) which extended constitutional protection to contraceptive use. In Webster, all nine Justices confirmed the Griswold protection to prevent life. See Webster, 109 S.Ct. at 3057, 3059, 3072, 3081. Put another way, there is no legitimate state interest to protect life if the life is not actual.

The term "potential", as used in Roe and Webster, must refer to the potential of the human being having a life after birth. It is not a denial that the unborn child is a living person. It is the ovum and sperm prior to conception which possesses qualities of potential. In other words, the privacy right enunciated in Griswold is designed to extend the couples choice to prevent creation of life.

Fourth, the event of conception is legally significant because of the Webster case. The state's compelling interest exists throughout pregnancy, but not prior to conception. The state

therefore has a compelling interest in this stage of human life, whether or not the court used the term "potential" life.

All this leads to the conclusion that the current Supreme Court has found that protectable human life begins at conception.

C.

THE UNBORN CHILD ENJOYS PROTECTION UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT. THE STATE'S COMPELLING INTEREST TO PROTECT THE UNBORN CHILD THROUGHOUT PREGNANCY ONLY EXISTS BECAUSE THE CHILD ITSELF HAS A PERSONAL AND EQUAL RIGHT.

Under the facts established in this case and the existing law of Webster, supra, there can be little doubt that the life of the unborn child enjoys protection under the due process clause of the fourteenth amendment of the United States Constitution. This principle is first established by the existence of a state interest which can only co-exist with a protectable personal interest of the class to which the state's interest attaches, and the irrefutable personhood of the unborn child requires protection under the due process clause because there would exist no compelling interest to exclude them from protection as a class.

1. THE STATE'S INTEREST CAN ONLY CO-EXIST WITH THE PERSONAL INTEREST OF THE INDIVIDUALS IT SEEKS TO PROTECT

The existence of a compelling state interest throughout pregnancy depends upon a corresponding interest possessed by the persons who are the object of the state's interest. The implications of the Webster ruling is that the unborn child has a personalized interest. If the state has the power to protect the life of a person, the person must have a personal corresponding right. The state's interest can only be co-existent with the interest of the person it seeks to protect. The nature of the state's interest is its parens patriae interest (or one so closely aligned with it to be indistinguishable). See, Santosky v. Kraemer, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982), defining the state's interest in terminating constitutionally protected parental rights of an infant's parents as the parens patriae interest in preserving and promoting the welfare of the child. Where the parens patriae powers are used to assert the interest of the child, even fundamental constitutional rights of the parent may be defeated. Santosky v. Kraemer, supra. The parens patriae interest of a state cannot exist without a co-existing personal right of the individual person being protected. C.f. Snapp v. Puerto Rico, 458 U.S. 592, 600, 102

S.Ct. 3260, 3265. Parens patriae refers traditionally to the role of a state as sovereign and guardian of persons under legal disability. Snapp v. Puerto Rico, 458 U.S. at 600 [n.8], 102 S.Ct. 3260. It is "often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves". Mormon Church v. United States, 137 U.S. 1, 57, 10 S.Ct. 792, 808 (1890). Whereas the parens patriae interests for certain "actions" may require the state to possess its own quasi-sovereign interests to exercise it (see Snapp v. Puerto Rico, 458 U.S. at 600 - 603, 102 S.Ct. 3265, 3266) it is clear that the interest must be concurrent. See, Raleigh Fitkin - Paul Morgan Mem. Hospital v. Anderson, N.J. 421, 423 (1964).

In Raleigh Fitkin v. Anderson, supra., the Supreme Court of New Jersey held that the state had an interest in protecting the life of an unborn child. The right was personalized to the unborn child and a guardian ad litem was appointed by the court. 42 N.J. at 423, 424. Prior to announcing the appointment of the guardian (who stands in the place of the child), the court specifically stated "the unborn child is entitled to the law's protection..." 42 N.J. at

423.[13] See also, Jefferson v. Griffin - Spalding County Hospital Authority, 247 GA. 86, 274 S.E 2d 457 (1981) (finding that an unborn child has a right to life). Taft v. Taft 388 Mass. 331, 446 N.E. 2d 395 (1983). (Recognizing the life of an "inviable" unborn child may provide a compelling state interest). The nature of the state's parens patriae jurisdiction is such that if the individual's rights did not exist, the state would have no interest.

The Webster court's pronouncement that a state has a compelling state interest throughout pregnancy infers that the unborn child has a possessory interest in the preservation of his own life. See, Rubenfeld, "On the legal status of the proposition that 'life begins at conception'" 43 Stanford L. Rev. 899 (Feb. 1991).

2. THE FACT THAT THE UNBORN CHILD IS A HUMAN BEING, A PERSON, REQUIRES PROTECTION UNDER THE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION I OF THE NEW JERSEY CONSTITUTION.

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[13] Influenced by the portion of the Roe decision modified in 1989 by Webster, the New Jersey Supreme Court's holding in Right to Choose v. Byrne, 91 N.J. 287, 306 was contra. But, this holding would no longer be valid following Webster.

The fourteenth amendment of the Constitution of the United States, states in part: "nor shall any state deprive any person of life, liberty, or property, without due process of law". It was acknowledged by the Supreme Court in Roe v. Wade that if the clause applied to an unborn child, the unborn child's right to life would be specifically guaranteed by the amendment. But it is now clear from the new developments in the sciences of genetics and medicine that in fact we are dealing with a person from the moment of conception, the Webster court has effectively held as much, and the interests of the state commencing at conception infer the existence of like rights in the unborn child.

There is nothing either in the specific language of the fourteenth amendment nor anything anywhere else in the constitution that would suggest that the group of persons referred to are limited by age or stage of development of human life. In fact the actual words "any person" is all inclusive. The word "any" is expansive and includes "each and every".

This conclusion is compelled by the following: (a) the unborn child is a human being and a member of the human race and therefore a "person"; (b) the empirical data which supports the conclusion that the unborn child is a person was not fully

appreciated at the time of Roe v. Wade; (c) the legal development found in Webster, supra which expands the interest of the state is in part derivative from the fact that the child exists, has a life of his or her own, and (d) the right to life of any person is considered unalienable.

The Supreme Court of New Jersey has recognized that the policy within our state is that life is more precious than non-life. In Berman v. Allan, 80 N.J. 420 (1979), Justice Pashman wrote:

> "One of the most deeply held beliefs of our society is that life - whether experienced with or without a major physical handicap - is more precious than non-life (citation omitted)... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the sanctity of life. The federal constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law... are own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947) Art. I, Sec. I. The Declaration of Independence states that the primacy of man's 'unalienable' right to life is a 'self evident truth'. Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped human beings." Berman v. Allan, 80 N.J. at 429.(emphasis added)

A corollary to that statement is that nowhere in these documents is there to be found an indication that the lives of the

most dependent human beings are less cherished or less protected than those fully developed. As we have seen, the state's parens patriae powers are designed to help those individuals who can least help themselves. Surely the power includes those who are most in need of the protection.

Equally important is that there is no legitimate interest on the part of the state to exclude one group of persons from the protection. Without a compelling state interest to exclude the class of unborn persons such a classification itself would be unconstitutional where a fundamental right would be deprived or impaired. Dunn v. Blumstein 405 U.S. 330 (1972); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968); Baker v. Carr, 369 U.S. 186 (1962); Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. Illinois, 351 U.S. 12 (1956).

No court is permitted to ignore the factual reality of the record in this case. An abortion of the plaintiff's unborn child is the death of a human being. Our current knowledge of genetics and medicine leads to the irrefutable conclusion that Mr. Loce's child is a person. The Supreme Court of the United States has reconsidered fundamental constitutional standards when the

passage of time has eroded the basis of its prior rulings. Most notably in Brown v. Board of Education, 347 U.S. 483 (1954), the court overruled the case of Plessy v. Ferguson, 163 U.S. 537 (1896), because the court found the current state of human knowledge regarding the psychological impact of segregation in schools upon minorities altered one of the assumptions on which Plessy relied. The court stated:

> "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by the record. Any language in Plessy v. Ferguson contrary to this finding is rejected."

The fundamentally false assumptions of the Roe court require a rejection of its ruling that the fourteenth amendment did not protect persons who are yet unborn following conception. Whatever the prevailing view of what constitutes a person in fact expands based on human knowledge it must overtake an antiquated fiction of law. (Compare, Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) with Brown v. Bd. of Ed., supra.)

Person can only mean human life, and the fourteenth amendment means all human life is entitled to its preservation. This is a moral imperative dictated by the essence of the life clause itself.

POINT III

JOHN DOE, AS THE NATURAL GENETIC FATHER HAS THE STANDING TO RAISE THE CONSTITUTIONAL RIGHTS OF HIS UNBORN CHILD. HE ALSO POSSESSES HIS OWN PERSONAL FUNDAMENTAL RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

When John Doe seeks court intervention on March 7, 1992, and acts to defend the life of his child, he does so in his status as natural father, acting for the child, and on his own behalf to protect his own fundamental rights under the fourteenth amendment of the United States Constitution.

The special relationship Mr. Doe enjoyes with the unborn child gives him standing to raise the constitutional rights of the child. In addition, Mr. Doe possesses his own fundamental rights.

A.
THE SPECIAL RELATIONSHIP BETWEEN MR. DOE AND HIS CHILD BASED UPON THE FACT THAT HE IS THE NATURAL GENETIC FATHER GIVES HIM UNIQUE STANDING TO RAISE THE INTERESTS OF THE CHILD.

1. AS THE FATHER OF THE CHILD, MR. DOE'S OWN INTERESTS ARE INTERTWINED WITH THAT OF THE CHILD'S AND MUST BE CONSIDERED IN THE MATTER OF STANDING.

The dissent in Planned Parenthood of Central Missouri v. Danforth 420 U.S. 52, 92, 93, 96 S.Ct. 2831, 2851, 2852 (1976) (written by Mr. Justice White, joined in by Mr. Justice Rehnquist and then Chief Justice Berger) recognized the right of a father to receive notice of an anticipated abortion of his unborn child. Because the majority in that case operated under the Roe ruling, since rejected by Webster, that the state did not possess a compelling interest prior to viability, the majority found that the father of the unborn child could not have an interest in receiving notice of an abortion. Because of the holding in Webster, the majority ruling in Danforth is no longer valid law and can no longer be considered a precedent to deny a father's standing.

However, even in 1976, only three years after Roe v. Wade, the three dissenting justices concluded that the father's standing to receive notice and take action to preserve the child's life was grounded in his own fourteenth amendment rights, stating:

> "It (his right to receive notice of the intended abortion) is instead recognizing that the husband has an interest of his own in the life of the fetus which can not be extinguished by the unilateral decision of the wife... the father's interest in having a child - perhaps his only child - may be unmatched by any other interest in his life. See Stanley v. Illinois 405 U.S. 645, 651, 92 S.Ct. 1208, 1212,..."

When analyzing the standing of Mr. Doe to raise the rights of his child, the court must incorporate into the considerations not only his unique status to the child as set forth below, but the father's own rights. The rights of the two are interwoven. Because of Webster the statements of the majority in the Planned Parenthood v. Danforth case may no longer be considered viable law.

2. MR. DOE'S STANDING UNDER THE PRINCIPLES ENUNCIATED IN GRISWOLD V. CONNECTICUT.

In Griswold v. Connecticut 381 U.S. 479, 85 S.Ct. 1678, the United States Supreme Court held that the Appellants, the executive director of a Planned Parenthood League of Connecticut and a defendant who is a licensed physician had standing to raise the constitutional rights of married couples who they served. See, Griswold v. Connecticut, 381 U.S. at 481, 85 S.Ct. at 1679, 1680. In Griswold, the appellants were convicted of violating the Connecticut birth control law and the court's analysis supports standing for Mr. Doe to raise the constitutional rights of his child. In Griswold, the relationship of the defendants to the couple whose rights were being asserted was the controlling factor,

particularly where it could be said that the defendants are serving the individuals possessing the constitutional interests.

In support of this principle, the court cited Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (where an employee was permitted to assert the rights of his employer); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (where the owners of private schools were entitled to assert the rights of potential pupils and their parents); and Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031 (where a white defendant, party to a racially restrictive covenant, was being sued for damages by the covenantor because she had conveyed her property to negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective negro purchasers to equal protection, although no negro was a party to the suit). Griswold v. Connecticut, 381 U.S. at 481, 85 S.Ct. at 1680.

The relationship between a father and a child, even an unborn child, has enjoyed traditional recognition in the law. Even aside from the constitutional considerations (set forth below) a father has traditionally enjoyed standing to protect the interests of his children. A parent, in New Jersey, is the natural guardian of the interests of his child. See R. 4:26-2 (recognizing the natural parent

is the only guardian to represent the interest of a child in a law suit who need not be appointed by court order). The relationship of a father to a child born out of wedlock gives rise to rights and obligations on the part of a father independent of the nature of his relationship with the child's mother or even the child. See, N.J.S.A. 9:17-40, et. seq. (the New Jersey paternity statute) which extends the obligation of a natural father to support a child born out of wedlock and grants him paternal rights, including the right to be the primary custodian of the child. Under the New Jersey guardianship statute, N.J.S.A. 3B:12-12 and accompanying case law, the guardianship for nurture vests in a father, and this "natural guardianship" was for bringing up and taking care of the child. Caruso v. Caruso, 101 N.J. Eq. 350, 139 A.H. (1928). The New Jersey statutory scheme for intestate succession creates rights in both the father and child who inherit from one another based only upon a genetic relationship. See, N.J.S.A. 3B:5-2.

Perhaps more importantly, the standing of a father to protect the interests of his natural child could not be constitutionally withheld from him. Both the father and the child possess a constitutionally protected interest and companionship with one another. Santosky v. Kramer 455 U.S. 745, 102 S.Ct. 1388

(1982). The protection of this relationship requires extending to the father the standing to assert the child's interests. The obligations of the father to protect the child's health and welfare require his raising the rights of the child, because the child has a legal impediment or inability to raise his own rights. The state's prevention of the natural father raising the child's rights would itself impermissibly interfere with them. The rights of both the child and the father cannot be defeated because third parties have acted to destroy the life of the child and therefore the relationship. All rights of the child could be destroyed by simply stating that a father's relationship has not ripened sufficiently, and the very ripening of the relationship can be frustrated by the act of terminating the life of the child.

Perhaps the most compelling reason for recognizing the father's standing (with the exception perhaps of the right being part of his constitutionally protected relationship) is the fact that in the abortion context no one else who also has standing has acted to protect the interests of the child. The mother, who has protected rights with respect to her child, including the unborn child, Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 1985 (1983), here, not only refuses to exercise her rights, but is actually the

party seeking to terminate its life. On the other hand, the state of New Jersey which has the power to exercise its parens patriae jurisdiction to protect the child, has refused to perform its obligation. It would be a constitutional deprivation of the child's constitutional rights, once recognized, to fail to extend the standing to the father under such circumstances. C.f. Santosky v. Kramer, 455 U.S. at 760, 102 S.Ct. at 1398 where the Supreme Court expressly recognized that the fundamental rights which protect the parent - child relationship are shared by the child: "...the child and his parents share a vital interest in preventing erroneous termination of their natural relationship". Abortion does just that in the most final way.

Once it is recognized that the unborn child is a human being, a person, it is difficult to imagine a more arbitrary violation of this fundamental constitutional right then when a child's life is terminated for no reason other then the inconvenience and embarrassment to one parent, where the mother's real interest in life is not present. The denial to the father of standing under these circumstances would be a deprivation of both the father's constitutional rights and those of the unborn child.

B.

THE PLAINTIFF IN THIS CASE POSSESSES HIS OWN FUNDAMENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT INDEPENDENT OF THOSE OF ITS CHILD. IN ADDITION, THE CHILD POSSESSES ITS OWN RIGHT TO ENJOY THE RELATIONSHIP WITH HIS FATHER AND THE FUNDAMENTAL RIGHTS OF EACH ARE SYMBIOTIC.

Mr. Doe enjoyes fundamental constitutional rights under the fourteenth amendment which protected his relationship with his unborn child. There is actually a bundle of rights that all come together in the relationship when it is threatened by abortion. It involves Mr. Doe's fundamental constitutional rights: (a) to his continued companionship with his child Santoksy v. Kramer, 455 U.S. 745, 102 S.Ct. 1388; (b) to procreate, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942); and (c) to discharge his obligations to his child and the corresponding personal liberty and freedom to make decisions about the welfare of his child, Pierce v. Society of Sisters, 268 U.S. 510, 518 (1924). Individually each extend a separate fundamental liberty interest to Mr. Doe. Collectively they delineate the constitutional dimensions of his relationship with his child, and constitute a set of rights which protect the relationship itself in all its aspects and interests including the Santosky rights of the child.

1. MR. DOE ENJOYS THE FUNDAMENTAL RIGHT TO CONTINUED COMPANIONSHIP WITH HIS CHILD AND UNDER SANTOSKY THE UNBORN CHILD POSSESSES A SECOND FUNDAMENTAL CONSTITUTIONAL RIGHT, A LIBERTY INTEREST IN THE RELATIONSHIP WITH HIS OR HER FATHER.

At the time of Planned Parenthood v. Danforth, 420 U.S. 52, 96 S.Ct. 1831, in 1976, the court was operating under the Roe trimester system by which a state did not have a compelling interest in life of the unborn child prior to viability. As a result, both the majority and the three judge dissent felt compelled, under Roe, to refuse to recognize the father's standing to raise the child's rights (because under Roe the child had none prior to viability). As we have seen, that is no longer the law under Webster and rights extend directly to the child.

However, even at the time of Danforth in 1976, Justices Rehnquist, White and Burger all found that standing existed for the father based upon his own constitutional rights. This is significant because under Roe there was no recognized human being in existence prior to viability. It represents compelling authority under the current state of the law since Webster.

The Danforth dissent stated:

> "...the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It but by no means follows, from the fact that the mother's interest in deciding 'whether or not to terminate a pregnancy' outweighs the state's interest in the potential life of the fetus, that the husband's interest is also outweighed by and may not be protected by the state. The father's interest in having a child - perhaps his only child - may be unmatched by any other in his life. See Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed. 2d 551 (1972), and cases cited." Planned Parenthood v. Danforth, 428 U.S. at 93, 96 S.Ct. at 2852.

Since the Danforth dissenting opinion, the Supreme Court has further expanded the fundamental constitutional right to which the dissent referred. Stanley was decided by the court in 1972 and involved an unwed father whose relationship with his child was terminated by the State of Illinois. In Stanley, the court rejected the concept that the failure of the father to have "a legal" relationship defeated his rights based upon his natural and biological relationship with the child stating:

> "The private interest here, that of a man in the children he has sired and raised undeniably warrants deference and, absent powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this court with the momentum for respect lacking when an appeal is made to liberties which derive merely from shifting

economic arrangements'". 405 U.S. at 651, 92 S.Ct. at 1212.

The right defined in Stanley, that of a parent's interest in the companionship, care, custody, and management of his or her children, was found by the Stanley court to be "cognizable and substantial". In case law subsequent to Danforth, the court refers to this right as "fundamental" requiring for its extinguishment a compelling state interest. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982). However, it might be said that there is a different standard imposed where the father is not married to the child's mother when compared to a traditional family setting where the child is born within wedlock and the mother and father are living together. Compare Santosky, with Stanley.

However, the dissent in Danforth was firm in their statement that the protected interest of a father was fundamental, that is sufficient to require a compelling state interest to overcome it, and it outweighed that of the mother in the context of an abortion. 428 U.S. at 93, 96 S.Ct. at 2852. A comparison of pertinent case law reveals that the difference between the two standards rests upon the efforts of the father to establish his relationship, and, the difference between a father who wishes to preserve the life of the

child, when weighed against the efforts of others who have standing to compete with the father's interests.

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, (1978), decided after Danforth, explains the distinction and under what circumstances the court would apply the strict scrutiny test instead of that used when the right is considered a "substantial interest".

Quilloin involved an unwed father. The Court stated:

> "We have little doubt that the due process clause would be offended 'if the state were to attempt to force the break up of the natural family, over the objections of the parents, and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest' Smith v. Organization of Foster Families, 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119 (1977). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family already in existence, a result desired by all concerned, except appellant." Quilloin v. Walcott, 434 U.S. at 255, 98 S.Ct. at 555.

This explanation in Quilloin supports the reasoning of the dissent in Danforth which would give fundamental status to the rights of the father of an unborn child, yet permit the less than

fundamental status of the right in situations such as Stanley and Quilloin (where it was found that "best interests of the child" standard was sufficient to terminate a father's rights rather than the "unfitness standard" found in Santosky). It also explains the difference in the treatment of the father's right in Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985 (1983) (where the fundamental right of a mother to continued companionship of her child whom she carried and to whom she gave birth were greater than that of the father where he never married the mother and never established a relationship with the child), as well as Michael H. v. Gerald D., 109 S.Ct. 2333 (1989) (where a California statute was upheld on constitutional grounds against the challenge by a man who was concededly a biological parent of a child born to a married woman where the married woman and her husband sought to preserve their relationship with the child).

The dissent in Danforth simply applied the Quilloin criteria and concluded that the natural father's right to continued companionship with his child, citing the father's right found in Stanley v. Illinois (where the child was born out of wedlock and the father had not married the child's mother). In Danforth the dissent undoubtedly relied upon the fact that, in the abortion

situation we are not dealing with an unwed father who never sought actual legal custody of his child. In the Danforth hypothetical the father was seeking an opportunity to assert that right, not a father who failed to. In the current case, Mr. Doe used every legal avenue available to him to assert his rights, but was denied them. In fact, Mr. Doe was the only person with responsibility for the child who sought to protect the child at all. This brings us to the second prong of the Quilloin test, the question of whether there is an existing family unit seeking to protect, nurture and care for the child. In Stanley there was not, and the rights of the father were upheld. In the Danforth context there would not have been. In this case, not only was there an absence of care and nurturing for the child on the part of any other family but the others who spoke, the mother and the state, failed to compete for custody, but actually sought, and succeeded in, the destruction of the child's life.

When all these factors are taken into consideration,the natural father is the only "natural family" of which Quilloin speaks and that relationship between the father and the child would be protected under the Santosky standard. But as Santosky makes clear, it is not just the father's right that is involved, but the right

of the child to preserve his or her relationship with his natural father. It is a symbiotic relationship that under the circumstances existing in the abortion context become so interwoven as to take on the rights of the family which are traditionally extended by the fourteenth amendment liberty interests found to be fundamental. Santosky v. Kramer, supra, Quilloin v. Walcott, supra; see also Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925), Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).

2. MR. DOE'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO PROCREATE WOULD BE DENIED BY HIM BY THE STATE OF NEW JERSEY IF RELIEF IS NOT GRANTED.

The United States Supreme Court has recognized a citizen's constitutional right to procreate in the case of Skinner v. Oklahoma, 316 U.S. 534 (1942). Mr. Doe's rights under the Skinner ruling were violated by the state's action in prosecuting him. In Skinner, the court found the appellant's rights under the equal protection clause of the fourteenth amendment was violated when his fundamental procreation right was denied him. In that case, under the Oklahoma statutes, because he was found to be a habitual criminal, he would be rendered incapable of procreation. Distinguishing him as a member of one class who was deprived a

fundamental right, the court found a violation of Skinner's rights under the equal protection clause, citing Yick Wo v. Hopkins, 118 U.S. 356, 369. Skinner v. Oklahoma, supra at 541. In Skinner, the Supreme Court stated:

> "marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects."

This right of Mr. Doe is implicated when the state fails to recognize his right to protect his unborn child and his relationship with him or her. To say one has the right of procreation and the state cannot prevent him from having the capability to conceive, becomes meaningless if once conception takes place, all of a father's efforts to see that his child is born are frustrated by the mother with the assistance of the state. The state licenses and supervises a network of hospitals and abortion clinics designed for no other purpose then to terminate the life of the child. Under these circumstances the natural process of procreation and the father's attendant hopes and dreams of a child related to him being brought into the world for him to nurture and care for that are destroyed. His procreation is terminated.

This not inconsistent with the line of cases that suggests that the mother who carries the child, gives birth and has an existing relationship with the child, has greater rights than the father in a situation where the two never married. We have too much respect for the right of the mother under such circumstances to suggest that such law should be disrupted. See In the matter of Baby M. 109 N.J. 396 (1988). However, this is not a case in which the mother is competing with the natural father for the right to be the primary custodian of the child. It is not even a case where the mother is indifferent to her rights. It is a case where the mother's energies, money, and the power of the state are used to terminate the life of the child and thereby frustrate all rights of the father. Her maternal rights cannot outweigh the rights of the father because she specifically rejects them.

3. MR. DOE POSSESSES AN INDEPENDENT CONSTITUTIONAL RIGHT TO DISCHARGE HIS DUTY TO HIS CHILD (AND RIGHT TO PRACTICE HIS RELIGION).

When Mr. Doe seeks intervention through the courts to protect his rights and those of his child, among the rights he seeks to preserve was his right to discharge his obligations those grounded both in law and nature, to protect, care for, nurture, and educate

his offspring. See generally, Pierce v. Society of Sisters, 268 U.S. 510, 518. The father, aside from his own rights, would have a legal duty to care for the child and protect the child's life (see N.J.S.A. 9:17-40). In nature what higher law is there? This right is grounded in the obligation reflected in the paternity statutes, and is recognized under the due process clause of the Federal Constitution, and the Constitution of the State of New Jersey, article I, section I, (extending the right to defend life). New Jersey case law is in accord with the principles enunciated under this point. See D.Y.F.S. v. A.W. 103 N.J. 591 (1986).

Mr. Doe possesses substantial fundamental constitutional rights including the right to maintain a relationship with his child, the right to care and nurture his child, his fundamental right to procreate, his fundamental right to discharge his obligation to protect and care for the child, and his right to practice his religion. Individually any one of these rights was sufficient to permit Mr. Doe to intervene on behalf of his child. Collectively, they overcome any countervailing interest and the state cannot interfere with them. It is this group of rights which give rise to the Danforth dissenting opinion that a father has the standings and rights with respect to the unborn child, even when the unborn

child was not recognized legally as a person. Now that the courts have recognized the child's own rights, while still unborn (See Webster), the father's rights are even greater, and he has standing to exercise both the rights of his unborn child and those of his own.

POINT IV

FUNDAMENTAL RIGHTS OF MR. DOE AND THE SEPARATE RIGHTS OF HIS UNBORN CHILD, INDIVIDUALLY AND COLLECTIVELY FAR OUTWEIGH ANY PRIVACY INTEREST THAT THE MOTHER HAS WHICH LEGITIMATELY INVOLVES THE DECISION OF ABORTION.

The fundamental constitutional rights of Mr. Doe (discussed under Point III) and those of his unborn child (discussed under Points II and III), individually and collectively far outweigh the legitimate privacy rights of the child's mother as they involve the decision of abortion. The subsequent case law of abortion, in Webster, and of the rights of a father and his child under Quilloin and Santosky, following the court's decision in Planned Parenthood v. Danforth in 1976, all operate to strengthen the conclusion found in the dissent in the Danforth case in which Justices Rehnquist, White and Burger found that a father's interest in having a child and his continued companionship with the child, would outweigh the mother's privacy interest, relying upon Stanley v. Illinois. Planned Parenthood v. Danforth, supra, 428 U.S. at 93, 96 S.Ct. at 2852.

This conclusion is true whether a woman is viewed as having privacy rights that support the broad abortion rights inferred in Roe

or whether her rights, even in circumstances where there are no competing interests, are more restrictive as suggested under Point II A - 2 (b), of this brief.

If the mother's rights are viewed as more restrictive as we suggest under Point II of the brief, then there would be no competing interests with those of Mr. Doe and his unborn child because in this case there is no evidence that the mother's life was in danger (and the conception was as a result of consensual relationships between a man and his fiancee). Therefore, argument is advanced on the assumption that the mother's right is an expansive one under Roe.

A. BALANCING AGAINST THE CHILD'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO LIFE.

If the unborn child possesses his or her own fourteenth amendment right to life, then a woman's privacy interests concerning a pregnancy would be outweighed by the child's right to life.[14] When the interests of the child are weighed against a woman's desire not to be embarrassed or inconvenienced by

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[14] Even the Roe court acknowledged as much. 410 U.S. at 156, 157, 93 S.Ct. at 728. This statement assumes the mothers life is not in danger and does not address the balancing of interest present when conception is due to rape.

pregnancy and child birth, there is no doubt that the child's right would prevail. Embarrassment or inconvenience cannot be the basis for taking the life of another human being. The mother's interest in avoiding the natural consequences of pregnancy are reasonably satisfied by the state extending to her her Griswold rights. It may be said that where the father expresses an interest and willingness in caring for the child, then much of her concern is satisfied. Since the mother's privacy right to make a decision about abortion where her own life is in danger was not implicated in this particular case, we observe that the legitimate concerns about the danger to the mother's life set forth in Roe v. Wade would not be present. The child's interest and that of the State throughout pregnancy must prevail. C.f. Webster, supra. We examine the other harms listed by the Roe court: (1) maternity or additional offspring may force upon a woman a distressful life and future; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. As we pointed out under Point II, these are legitimate concerns that implicate the right of privacy. But they do not outweigh a state's compelling interest to protect the life of the unborn child, or the

right of the child him or herself. These are only reasons to have avoided pregnancy in the first place. It is a well established right of a woman and couples to prevent pregnancy and state action which would interfere with that right is unconstitutional. See Griswold, supra. The mother's fourteenth amendment Griswold rights are sufficient to satisfy these concerns. It would not be reasonable for a woman to expect that once she failed to exercise her fourteenth amendment Griswold rights, that her interest to avoid embarrassment and inconvenience would be sufficient to permit her to take the life of her own child, over the objection of the child's father and expect that others in society or the state would assist her in her endeavor. See California v. Greenwood, 108 S.Ct. 1625, 1628 (1988).

In addition, the disagreement of the father and the mother, and, the competing interest of the child whose rights are asserted, force the state to choose between life and its destruction. For the state to side with those who would discard human life when confronted with the substantial and asserted rights to preserve and protect it, the inherent nature of the state's power would require it to choose life over the destruction of it. See Berman v. Allan, supra, Gleitman v. Cosgrove, 49 N.J. 22 (1967).

In Gleitman v. Cosgrove, at 30, the New Jersey Supreme Court stated:

> "The right to life is inalienable in our society ... we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor ... (that) it may have been easier for the mother and less expensive for the father to terminate the life of their child while he was an embryo, but these alleged determinants cannot stand against the preciousness of the single human life... 49 N.J., at 30, 31 (emphasis added) (the holding in Gleitman was reversed by Berman when the Supreme Court of New Jersey thought that its law was superseded by the doctrine enunciated in Roe v. Wade).

Because of the Webster decision the application of the reasoning of the New Jersey Supreme Court in Gleitman again has application to the unborn child. The nature of the child's right as being unalienable, that the life of the human being has sanctity, and that it possesses a preciousness require us to preserve the life of the child when balanced against the interest of a mother who failed to exercise her Griswold rights. To do otherwise would violate the fundamental basis on which all society exists. See Berman v. Allan, supra.

A word on the alleged "harms" listed by the Roe court is necessary. It seems sinister for our country to adopt as official

policy that child rearing is an experience to be dreaded and feared to the point that we support a mother's termination of her child's life. There is another view that we think prevails: that we should not encourage a loathing for life but a love for it. It is a view that includes an appreciation for the happiness and fulfillment that children bring to what may be an emptiness of purpose for many.[15]

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[15] Studies have shown that most women who have contemplated before birth the surrender of a child for adoption change their mind after birth. This is one reason why the basic standard in adoption published by the Child Welfare League, states that "a relinquishment should not be taken until the child is born, and the mother has recovered from the effects of delivery", Sec. 2.22 Child Welfare League Standards for Adoption Services, 1978. The distress cited in the Roe court seems to be overcome when the love of the mother outdistances the fears of the unknown future. We are too respectful of the negative experience of the unwed mother not to be concerned for her situation. Society should support her in her time of need and all efforts should be made to help her keep her child if she chooses (even over the objections of the father; see Baby M, 109 N.J. at 462, 463).

The mother's Griswold rights are sufficient to protect her from the "harms". For those mothers who still feel they can not raise their child even after birth, they are free to choose to let the father raise the child or (after all support and help fails) surrender the child for adoption. No mother should be asked to carry a child just to surrender a baby, but adoption is available for those who choose it. The guilt associated with abortion for some women may carry greater stress then unwed motherhood. Griswold rights of a mother and her right to choose an adoption

B. THE RIGHTS OF MR. DOE TO THE CONTINUED COMPANIONSHIP WITH HIS CHILD, HIS RIGHT TO PROCREATE, HIS FUNDAMENTAL RIGHT TO DISCHARGE HIS OBLIGATIONS TO HIS CHILD, AS WELL AS THE CHILD'S RIGHT TO LIFE AND TO MAINTAIN ITS RELATIONSHIP WITH ITS FATHER OUTWEIGH THE INTEREST OF THE MOTHER'S PRIVACY RIGHT.

That a mother does not wish to exercise her rights only strengthens those of the father in Mr. Doe's position, and the father's relationship with the child, and the child's relationship with him. See discussion under Point III. Where, however, she does not simply exercise an indifference to her own rights, but seeks to destroy those of the child and father, her rights not only fail to outweigh theirs, but dissipate in the process (if she had them in the first place - see Point II A-2(b)). Where the mother refuses to exercise her privacy rights under Griswold, and the father and child seek to assert theirs, there is no interest that either the mother or the state would have that could interfere with their rights to life and liberty under the due process and equal protection clauses of the fourteenth amendment. The mother's failure to exercise her Griswold rights under the circumstances of this case are materia!

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make her privacy interest subordinate to those of the child (and where exercised, the father).

to the court's consideration and what weight should be given to her right. See Quilloin v. Walcott, 434 U.S. at 255, 98 S.Ct. at 555.

CONCLUSION

Recent developments and discoveries in science and medicine support the irrefutable conclusion that the life of a person begins at conception. The unborn child is a complete individual member of the human race throughout pregnancy.

The unborn child enjoys constitutional protection under the due process clause of the fourteenth amendment of the United States Constitution and under article I section I of the Constitution of the State of New Jersey. Pronouncements to the contrary found in Roe v. Wade have been totally undermined by subsequent decisions and events and is no longer viable law.

Mr. Doe, as the natural genetic father has the standing to raise the constitutional rights of his unborn child. He also possesses his own personal fundamental rights under the due process clause of the fourteenth amendment that require protection.

The substantial and fundamental rights of Mr. Doe and the separate rights of his unborn child, individually and collectively far outweigh any privacy interest that the mother has which legitimately involves the decision of abortion.

The prosecution of Mr. Doe was an unconstitutional intrusion upon the rights of his fundamental constitutional rights and those of his unborn child.

Respectfully submitted,

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J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff,	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92
vs.	:	CIVIL ACTION
V.C.; W.M.C.; et al	:	

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF J.M.'S MOTION FOR RECONSIDERATION TO VACATE THAT PORTION OF THE COURT'S MARCH 19, 1992 ORDER DISMISSING THE CLAIM OF J.M. INDIVIDUALLY

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POINT I

DEFENDANT V.C.'S RELIANCE UPON PLANNED PARENT-HOOD V. DANFORTH IS BASED UPON A MISCONSTRUC-TION OF THE DECISION AND A MISINTERPRETATION OF CURRENT LAW. THE ISSUE OF THE FATHER'S RIGHTS, AS PRESENTED IN THE CURRENT CASE, HAS NEVER BEFORE BEEN DECIDED BY THE UNITED STATES SUPREME COURT. THIS CASE PRESENTS ISSUES THAT WERE NOT PRESENT IN DANFORTH AND A MAJORITY OF DANFORTH RECOGNIZED THAT THE FATHER OF AN UNBORN CHILD POSSESSES CONSTITUTIONAL RIGHTS.

The case of J.M. v. V.C. involves questions of first impression not only in this jurisdiction, but issues never before decided by the United States Supreme Court. None of the cases cited by V.C. involve a father and therefore do not directly implicate his constitutional rights and his standing to assert the rights of his unborn child.

V.C. misinterprets the decision in Planned Parenthood v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976), and fails to address the changes in the current law that render the plurality holding in Danforth no longer the law of the land.

In his original brief, Plaintiff J.M. cites various constitutional rights that he asserts. See IPb62-14 to IPb71-12.[16] J.M. cited the dissent in Planned Parenthood of Central Missouri v. Danforth supporting one of the five constitutional rights on which he relies. In the dissent in the Danforth case, 420 U.S. 52 at 92, 93, 96 S.Ct. 2831 at 2851, 2852 (1976), Justices White, Rehnquist and Chief Justice Berger recognized the constitutional right of a father to the companionship of his child. That very same right was also recognized as having constitutional dimension by Justice Stewart and Justice Powell in a concurring opinion, Planned Parenthood of

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[16] Including the supplemental brief, the plaintiff has submitted four briefs in the case before the Chancery Division. For reference purposes we have numbered them by placing a roman numeral before the designation "Pb" so the references are as follows:

IPb refers to the plaintiffs brief submitted on March 9 in support of initial T.R.O. (consisting of seventy-eight (78) pages)

IIPb refers to plaintiffs reply brief dated March 19, 1992 (consisting of eleven (11) pages)

IIIPb refers to the Amended brief in support of plaintiff's motion for reconsideration dated April 10, 1992 (consisting of eighty-one (81) pages)

IVPb refers to this supplemental brief.

Central Missouri v. Danforth, 428 U.S. at 89-91, 96 S.Ct. at 2850, 2851. Both Justices Stewart and Powell cited with approval Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d. 551 (a father's right to companionship with his unborn child) and Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86, L.Ed. 1655 (the right to procreate).

In the plaintiff's original brief filed with the Chancery Division, the plaintiff failed to clarify two important aspects of Danforth: (a) that five justices recognized J.M.'s constitutional right to companionship (not three); and (b) that the right exists even before birth in the abortion context is established law. V.C. in this case ignores this aspect of the Danforth decision. It has application to the case at bar, particularly in view of the changes represented by Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989). Planned Parenthood of Central Missouri v. Danforth therefore is authority that a father indeed has a constitutional right to companionship with his child. (Justices Stewart and Powell in concurring opinion, and Justices White, Rehnquist and Berger in dissent). All five agree that the father has a constitutional right to continued companionship with his child, although the child has not yet been born.

The plurality decision, written by Justice Blackmun, has reasoning that is no longer applicable and no longer good law. Justice Blackmun's reasoned:

> "The State cannot 'delegate to a spouse veto power which the State itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy'. Clearly, since the State cannot regulate or prosecute abortion during the first stage when the physician and his patient makes that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion, during that same period."

Justice Blackmun's decision focused on the principal, (then accepted by a majority of the court) that a State does not have a compelling interest throughout pregnancy. Under the current law, that principal is no longer accepted by a majority of the court. See IIIPb36-19 to IIIPb39-15; IIPb1-1 to IIPb5-9.

The reasoning by Justice Blackmun in Danforth is inapplicable to the case at bar for other reasons as well. That case did not involve a husband who was asserting his own constitutional rights. The interest the state was seeking to advance was not one to preserve life or potential life. Rather it was the State's interest in preserving the "perception of marriage as an institution". The State's interest of that nature has never been found to be

"compelling". Here, however, the right of the father being asserted involves his right to preserve the life of his own child and under the current law (where five judges of the current court find that a State has a compelling interest throughout pregnancy) that is an interest that justifies denying an abortion to a woman.

More pertinent to the case at bar is a comparison of the analysis of Justice White's dissenting opinion with the concurring opinion of Justice Stewart. Even in the context where it is simply a State seeking to protect the perception of the integrity of a family, Justice Stewart correctly recognized that the father's rights were implicated. However, his analysis failed on the focus of his inquiry. He differed with the three dissenting justices on the basis that one of the parents should be given a veto over the question of whether an abortion should take place. The more correct focus was the question of whether one party has the power to veto the constitutional rights of another. Logically if the answer is that one parent can't veto the constitutional rights of another, then a mother can't veto the constitutional rights of a father. The inquiry or the question was whether it took two parents to agree that an abortion take place. In essence, the dissent is simply saying that before the life of a child can be destroyed, both parents must

agree on such a deleterious course for the child. If one parent or the other votes for the life of the child, then the second parent must comply with the wishes of the other. Otherwise, one parent could destroy the constitutional rights of another. The reason advanced for a mother's right to abort a child equally apply to the father, yet he can't destroy a mother's right to companionship with her child. See Point II below.

In addition, we only need look at the logic for the justification for the mother being able to the destroy the rights of the father. Just as it does not follow that the courts must conclude that one parent's vote is sufficient to take the life of a child, the reason that the power is given to the mother does not relate to questions pertaining to what is in the best interests of the child, or justify a mother taking the life of her child. That the mother carries the child physically draws a factual distinction between the role of the father, there is no doubt. But that fact is reflected in the law of the State of New Jersey on the question of custody. Our law requires that preliminary questions of custody in situations where a child is born out of wedlock, requires that the baby stay with the mother absent a showing of unfitness or the like. See In the Matter of Baby M, 109 N.J. 396, 462, 463 (1988). The fact that

the mother carried the child does not bear upon rights to terminate the life of the child. Rather, it bears upon questions relating to what is in the mother's interest and the interest of the child following birth. That is because the carrying of the child directly relates to bonding, which affects the health of both the child and the mother. The fact that the mother carries the child is certainly not an unimportant consideration and is one concerning which we have deep respect. However, the mother's cherished role in the life of the child bears no relationship whatsoever on the question of the child's death, but rather relates to circumstances where the child will be born. The New Jersey policy which extends the rights to equal custody and say in the rearing of the child (subject to fact intensive analysis on what is best) is grounded in New Jersey Paternity Statues. N.J.S.A. 9:17-38, et seq.

Not only does the reasoning of Justice Stewart not support their conclusions at the time they rendered the decision in 1976, they no longer have application because of the current changes in the law. As we have seen, the State is now recognized as having a compelling interest in preserving the life of the unborn child. That was not the case when Justice Stewart wrote his concurring opinion. That being the current law, a father's interest can be no

less than that of the State. See IPb50-1 to IPb52-16. In other words, if the State can stop destruction of a father's rights, so can a father.[17] But equally important is the fact that there is a new balancing and weighing of the interests involved. In the appellant's brief, we cited four constitutional rights that J.M. possessed individually: the right to companionship (recognized by five judges); the right to procreate; the right to defend life; and the right to discharge his obligation to his child. In addition, we point out the fifth constitutional right of J.M. that would be denied him if the abortion decision were a mothers' only - the right to the equal protection of the law. That one parent would be given the absolute power to determine whether a child shall live or not, and that right would be denied another class of parents, would be a violation of equal protection as set forth under Point II of this brief.

At the time that Justice Stewart and Powell concurred in the Danforth decision, the Supreme Court of the United States ruled

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[17] We do not suggest that the child does not have his or her own individual rights as set forth in Appellant's main brief. However, for the sake of argument and in dealing with the father's rights only, we needn't reach the conclusion that the child has his individual rights to recognize the fact that the father had the right to block the abortion.

that the constitutional right of a mother which involved a decision concerning abortion was a fundamental right. That is no longer the law of the land. Roe v. Wade, referred to the abortion right as a fundamental one. In the recent United States Supreme Court case of Hodgson v. Minnesota, 110 S.Ct. 2927 (1990) and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), the majority of the Supreme Court of the United States declined to refer to the mother's abortion right as "fundamental", but considers it a liberty interest only. Because five justices of the current court no longer accept the nature of the right as being fundamental, that portion of Roe v. Wade, which deemed the abortion right a "fundamental right" is no longer the law of the land. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 940 F.2d at 690 to 694 (3rd Cir. 1991). If the mother of J.M.'s child did not possess the fundamental right, whereas he possessed five separate constitutional rights, all of which are deemed fundamental, then the State of New Jersey would be required to preserve the rights of a father when he asserts them. This does not mean that the child does not have his or her own constitutional rights, independent of the father. Nor does it mean that J.M. did not have the constitutional right to assert the rights

of his child. We simply distinguish his rights from that of a child and point out the power and force of his bundle of rights when weighed against whatever interest a mother has in terminating the life of her own child.

POINT II

EXTENDING AN EXCLUSIVE DECISION MAKING POWER CONCERNING THE LIFE OF THE UNBORN CHILD TO A MOTHER IS A DENIAL OF J.M.'S OWN CONSTITUTIONAL RIGHTS AND A DENIAL TO HIM OF THE EQUAL PROTECTION OF THE LAWS

In this case, J.M. raised four constitutional rights personal to himself: his fundamental right to companionship with his child, his fundamental right to procreate, his fundamental right to discharge his obligation to his child, and his federal due process right and New Jersey Article I right to protect the life of his child.[18] See IIIPb52-1 to IIIPb69-8. In his Amended brief J.M. also raised his constitutional right to the equal protection of the laws. We here

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[18] V.C. misses the point on the defendant's right to defend life. She argues that a State constitutional right can't supersede that of the Federal Constitution if the State right were to frustrate rights guaranteed under the Federal Constitution. That goes without saying. But where the United States Supreme Court, through the opinion of five of its justices, observe that a state has a compelling interest in preserving the life of the unborn child throughout pregnancy (see, Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d at 690 to 694 (3rd Cir. 1991) (holding that if five justices of the Supreme Court disagree with a previously pronounced principle of law, the old principle is no longer the law of the land)), the State's constitutional right extended to the defendant to protect life would advance an interest that is considered compelling and the father, in exerting his own rights, could stop an abortion.

further define it. If defendant's interpretation of Planned Parenthood v. Danforth, 420 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976) were to be adopted by this court, then the State would violate an additional constitutional right of J.M. - that of the equal protection of the laws.

J.M. IS ENTITLED TO EQUAL PROTECTION OF THE LAWS

A dispute such as the one before the court, where a natural father seeks to preserve the life of the child and the child's mother seeks an abortion, has never been decided by either our courts in New Jersey or those of the Federal Court system. If New Jersey were to extend to the mother the exclusive decision making power over the question of what is in the best interests of the unborn child, and reposit in her the exclusive decision making power over whether a child shall live, the extension of such a right to the mother is a denial of the equal protection of the father. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The New Jersey Supreme Court has clearly and accurately stated equal protection concepts in the three different types of scrutiny to which state action is subjected. In U.S.A. Chamber of Commerce v. State, 889 N.J. 131 at 157, 158 (1982):

"When (state action) regulates 'fundamental rights' or 'suspect classes' it will be subject to 'strict scrutiny' and the state will be required to demonstrate (1) that a compelling need justifies the legislation and (2) that no less restrictive alternative will accomplish that state objective. See Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). At the other end of the spectrum is the rational basis test. Under this standard of review, a court inquires whether there is a conceivable, legitimate state objective and second whether the classification selected is rationally related to that objective. Id. at 371-72, 91 S.Ct. at 1851-52, 29 L.Ed.2d. at 541; Dandridge v. Williams, supra, 397 U.S. at 486-87, 90 S.Ct. at 1162, 25 L.Ed.2d. at 502-503. In considering the second, the categories need not be formed with mathematical nicety and legislatures may attack a problem one step at a time. Williamson v. Lee Optical, supra, 340 U.S. at 488-89, 75 S.Ct. at 464-65, 99 L.Ed. at 572-573 (1955).

The third approach, articulated by the Supreme Court in Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d. 397 (1976), is an intermediate one. The appropriateness of intermediate scrutiny depends upon the character of the legislative classification or the nature of the rights affected by the statutory scheme. It may be that a 'semi-suspect' classification, like gender, is implicated or that a fundamental right is being substantially affected in an indirect manner. E.g., Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100 (1972). In these circumstances the legislative classification must serve important governmental objectives and must be substantially related to achievement of those objectives."

1. THE CLASSIFICATION DRAWN BY NEW JERSEY EXTENDING RIGHTS TO MOTHERS AND DENYING THEM TO FATHERS, MUST BE STRICTLY SCRUTINIZED AND WOULD REQUIRE A COMPELLING INTEREST FOR ITS JUSTIFICATION, BECAUSE IT DENIES THE FATHER ONE OR MORE FUNDAMENTAL RIGHTS.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment of the United States Constitution may rise under the case law or common law of the State as well as under its legislative enactments. Jersey Shore Medical Center - Fitkin Hospital, et al. v. Estate of Baum, 84 N.J. 137, 143, 144, 145 (1980).

The New Jersey Supreme Court, in Jersey Shore has stated:

> "The Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law. The applicability of the equal protection clause depends not on whether a state has exercised its power in any particular form, but whether it has, in fact, exercised that power. New York Times Co. v. Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d. 686, 697 (1964). A state is obligated to provide equal protection of its laws not only in the acts of its legislature, but also in the decisions of its courts. Stated otherwise 'it has been recognized that the actions of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings, in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.' Shelly

> v. Kraemer, 334 U.S. 117, 68 S.Ct. 836, 844, 92 L.Ed. 1161, 1182-1183 (1948) (footnote omitted) (further citations omitted). Accordingly, the discrimination against husbands which results from application of the New Jersey Common Law Doctrine of Necessaries may be challenged under the Equal Protection Clause of the Fourteenth Amendment." Jersey Shore v. Estate of Baum, 84 N.J. at 144, 145.

The classification created by New Jersey Law, if it were to exclude fathers from the decision making process and give that decision making ability only to mothers, would require, for its justification, a compelling state interest, because it would deny J.M. his fundamental constitutional rights: (1) of Companionship with his child; (2) to procreate; (3) to discharge his duty to his child; and (4) to defend the life of his child. Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533, 561-562 (1964); Kraemer v. Union Free School District, 395 U.S. 621, 626-628 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See IIIPb52-3 to IIIPb-65-25.

New Jersey has recognized parental rights, generally, as implicating constitutional rights under our own constitution. See D.Y.F.S. v. A.W., 103 N.J. 591 (1986). The Supreme Court of New Jersey has recognized that a father not married to a woman

who carries his child, even where conception is the result of artificial insemination, enjoys an equal right to custody under the paternity statutes of the State of New Jersey. See In the Matter of Baby M, 109 N.J. 396 (1988). It is rather clear that if a court finds that any fundamental right of J.M. exists, a classification which extended decision making to one parent based upon gender and denied it to the other would be a deprivation of J.M.'s right to equal protection of the laws because it would deny him one or more of his fundamental constitutional rights. That result would be required by a balancing of the harms to the father and mother. The objective in giving the mother a way to avoid the stress of child rearing can be achieved in a way that doesn't deprive the father of his rights: she need not participate in the child rearing if that is her choice. The state's interest in helping her avoid the stigma of unwed motherhood is satisfied in the same way. The state's interest in helping her avoid the stigma of pregnancy out of wedlock cannot be said to be compelling (and therefore justify denying the father his fundamental rights) where the mother did not take all necessary steps to avoid the pregnancy herself.

2. THE COURT NEEDN'T FIND THAT THERE BE A DEPRIVATION OF FUNDAMENTAL

CONSTITUTIONAL RIGHTS OF J.M. FOR THE COURT TO FIND THAT THERE IS A DENIAL OF EQUAL PROTECTION OF THE LAWS. THE GENDER BASED CLASSIFICATION REQUIRES INTERMEDIATE SCRUTINY AT THE VERY LEAST.

Because the classification created by the State action would be gender based an intermediate scrutiny would be applied to the New Jersey classification and would be unconstitutional even if a fundamental right wasn't involved.

The court needn't conclude that J.M. has a fundamental right in order to find that there is an equal protection violation (although it is clear that he does have such fundamental rights). Even if the rights that he asserts could be classified only as liberty interests there would have to be a valid interest of the State that relates to the purpose of the distinction in giving the power of life and death of one parent and not to the other. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 300 (1977).

Where the mother's life is not at stake and she was not denied her voluntary powers at the time of conception (such as in the case of rape or its equivalent) there is no valid distinction between

a father's place in making decisions on the life of his child and that of a mother. The reasons advanced by the U.S. Supreme Court to support the mother's justification for an abortion apply equally to a father (the stress in rearing a child and stigma associated with unwed parents). We recognize that there is a factual difference in the contributions that a mother makes in carrying a child which is not made by the father. However, that distinction is properly recognized in the law which extends to the mother the right to choose to be the primary custodian when the parents do not live together at the time of birth. This distinction is already reflected in our case law. In the Matter of Baby M, 109 N.J. 396, 462, 463 (1968). The fact that the mother carried the child does not bear upon the right to terminate the life of the child. Rather, it bears upon questions relating to what is in the mother's interest and in the interest of the child following birth. That is because the caring of the child directly relates to bonding, which affects the health of both the child and the mother. This is not an unimportant consideration and is one concerning which we have deep respect. However, it bears no relationship to the question of whether a mother or father should be included in the decision making process concerning the best interest of a child where the sole question

presented is whether the child should live or die. Young children are always dependent upon adults to survive. That an unborn child relies upon its mother for nourishment is not unique. Indeed, that fact creates obligations to the child, not exonerations. Even doctors, unrelated to a child, have legal obligations not to harm a child which is in a mother's womb. Smith v. Brennan, 31 N.J. 353 (1960). The New Jersey policy extends the right to equal custody and say in the rearing of a child (subject to fact intensive analysis of what is best for the child) and is grounded in New Jersey paternity statutes, N.J.S.A. 9:17-38 et seq.

Under the New Jersey parentage act, the obligations of J.M. are derived from the fact of conception alone. This logically flows because he has no power or control over the course of the pregnancy. Therefore, his obligations are really derived from the fact of the conception itself, and the birth of the child is a natural consequence of it. His duty to be a father under the law, which includes support, is derived from the single act of conception. He has no right to demand an abortion, nor should he. His embarrassment or hardship, or distress that flows from an unplanned pregnancy, whether he is prepared to rear the child or

support the child, is irrelevant to the question of whether society should extend him the right to destroy the child's life.

However, where the choice he seeks to enforce is one consistent with the child's best interest, the same statute that imposes obligations upon him based upon the single act of conception, extends to him the right to affirmatively choose to live up to his obligations and help raise the child through custody and visitation.

Likewise, under the adoption statutes, a judgment of adoption cannot be entered against the natural father over his objection, expressed to a court, unless there is a specific finding that he has abandoned the child or is guilty of neglect. N.J.S.A. 9:3-46. The right of a natural father who is not married to the mother, under the New Jersey Statutory scheme, is based solely upon his status as genetic father. That right to block an adoption is based upon the act of conception only. See, In re Adoption of a Child by J.R.D., 246 N.J. Super. 619 (Ch. Div. 1990).

The issue can be framed in different ways. The state may choose to frame the issue as the father blocking the mother's right to take the life of her own child. But probably more to the point and of greater clarity is that what V.C. proposes is that the

father's enjoyment of the benefits of his relationship with his child, his fundamental constitutional rights, can be arbitrarily entrusted to another who could destroy the relationship that he has with his child upon whim, fancy, unfounded facts and assumptions and may very well constitute a decision which would later be regretted even by the mother who made it.

If the fundamental constitutional right of the father is implicated, then the classification created by New Jersey law that would extend exclusive decision making power to the mother is a violation of due process because there would be no compelling interest of the State. If the constitutional rights were not deemed fundamental, the classification created by New Jersey statutes is gender based, requiring intermediate scrutiny. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d. 397 (1976). As a result, the State classification must serve important governmental objectives and must be substantially related to the achievement of the objectives. The objective here is to protect the right of the mother to participate in making decisions about whether she shall become pregnant. See Roe v. Wade, 410 U.S. Ct. 153; 93 S.Ct. at 727. That objective really is a joint one which involves both parents. To say only fathers or only mothers can demand an abortion is not a

classification which truly relates to the objective in question. For another the Griswold rights adequately satisfy this interest. When a father asserts what is in the interest of his child, what is in the interest of the family prevents the decision making power from residing exclusively in one parent or the other.

Where one parent or the other is willing to raise the child or take responsibility for the child, the inconvenience of raising the child is not a consideration. Questions pertaining specifically to gender certainly don't relate to the question. With respect to the inconvenience of carrying the child, which is one that is unique to the mother, these considerations are not implicated. Those considerations are relevant only prior to conception concerning the decision of whether a woman should become pregnant or not. Once she is pregnant, and a father has constitutional rights, and another human being is in existence, a State has a legitimate compelling interest in protecting the life of the child if requested. The inconvenience of the mother in carrying the child is never really a consideration. That is reflected in the fact that even under Roe v. Wade the State has a compelling interest in protecting the life of a child in the third trimester when pregnancy is most inconvenient to a mother and when she is subjected to the

greatest pain and discomfort at the time of childbirth. Therefore, gender is not a legitimate distinction that specifically relates to the State's objectives concerning the question of whether a child should live or not. The parental rights of J.M. extended to him under New Jersey law and the Federal Constitution are always based upon what is in the child's best interest. Fantony v. Fantony, 21 N.J. 525, 536 (1956). This is even true in a situation where conception of a child is the result of artificial insemination under a contract that is unenforceable and void ab initio as contrary to the public policies of the State of New Jersey. In the Matter of Baby M, 109 N.J. 396 (1988). In actuality, when one parent chooses to preserve the life of the child, he is exercising his parental right to do what is in the child's best interest. To extend total power to one parent, such to destroy those constitutional rights based solely upon the sex of the parent, bears no relationship to the state's objective to allow couples to avoid pregnancy.

Finally we note that it is not clear why the New Jersey Supreme Court dismissed the infant's claim in the case of J.M. v. V.C., M-970, March 1992. However, it is incumbent upon this court to make findings on the question of whether an unborn child

is a human being. To that end, we note that the New Jersey Supreme Court in applying New Jersey Law has stated:

> "It is clear that medical authority has recognized that before birth an infant is a distinct entity and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth." Smith v. Brennan, 31 N.J. at 364.

The Supreme Court has also stated that:

> "Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body." Id. 31 N.J. at 362.

A finding of fact is appropriate and relevant to the separateness of the unborn child as a complete human being. Even our own Supreme Court has said as much as early as 1960. A clear record should be provided so this finding may be used in reaching legal conclusions concerning the father's rights.

POINT III

BECAUSE A STATE HAS A COMPELLING INTEREST IN PROTECTING THE LIFE OF AN UNBORN CHILD THROUGHOUT PREGNANCY, NEW JERSEY HAS THE POWER TO RULE IN FAVOR OF J.M. WHO SEEKS PROTECTION FOR THE LIFE OF HIS CHILD, WITHOUT THE COMPULSION OF THE ORIGINAL DECISION OF ROE V. WADE. NEW JERSEY LAW CLEARLY PROVIDES FOR THE BEST INTEREST OF THE CHILD AND SUPPORTS THE FATHER WHO SEEKS TO PRESERVE THE LIFE OF HIS CHILD.

J.M., in his amended brief, advanced five constitutional rights implicated by this case. Arguments pertaining to two of those rights (companionship with his child, and equal protection) have been supplemented in this brief. In addition to those five constitutional arguments, J.M. advanced argument on New Jersey's law which would protect the right of the father to do what was in the best interest of his child (See Amended Brief Point IIIB(6)). This point supplements that argument.

As we have clearly expressed, under current law, the State of New Jersey is free to protect the life of the unborn child if it chooses to exercise its power. (See IIIPb36-19 to IIIPb39-15; IIPb1-1 to IIPb5-9). Whether the State chooses to exercise its power through criminal statutes or not, is irrelevant to the question of whether the State will or must exercise that permissible power

in the context of the case such as that before the court. Here, a natural parent of the child (and the mother's opposition) compels the State to rule one way or the other. New Jersey, under its current law, and with the restraints of Roe v. Wade now lifted, clearly supports a father's effort to do what is in the best interests of his child and preserve the child's life, over the objection of the parent who seeks to destroy that life.

Some preliminary observations should be made before further elaboration of New Jersey law that would control this dispute. Firstly, the New Jersey Supreme Court has not ruled on the New Jersey Law in the matter of J.M. v. V.C.. Obviously, if the New Jersey Supreme Court intended to establish a legal right on the part of the mother over the objection of the father based upon State law, the court, would say so expressly. Their failure to speak in the matter of J.M. v. V.C., together with the court's reference to "current law" in its order on Motion 970, leads to the inescapable conclusion that the Supreme Court of New Jersey erroneously believed that Roe v. Wade still acted as a bar to a State protecting the life of an unborn child.

Secondly, since the New Jersey Supreme Court's Order dated March 24, 1992, oral argument was held in the United States

Supreme Court in the Matter of Planned Parenthood of Southeastern Pennsylvania v. Casey. A copy of portion of that transcript is attached hereto for the court's reference.[19] In exchanges between Justices on the bench and members of the bar, Justice Scalia clearly corroborated the position of plaintiff in this case. In this case, the plaintiff has continuously (twice making argument to the New Jersey Supreme Court) that New Jersey is free to assert its own position on whether the father has rights, whether New Jersey would side with the father, or whether the unborn child is a person under New Jersey law who has her own rights. On April 22, 1992, Justice Scalia stated from the bench:

> "We did not say in Roe that a State could not have a position on whether a fetus is a person, did we?...We said that the Constitution takes no position on whether a fetus is a person, and/or that it does take a position that a fetus is not protected by the constitution...including State regulation on the basis of the people's determination within that State that a fetus is a person. There is nothing in Roe that says that a State may not make that judgment if it wishes." See Transcript attached.

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[19] The transcript portion is taken from a reprint by the New York Times. An official copy of the Supreme Court transcript has been ordered by the plaintiff but has not been received as of the time of the dictation of this brief.

It is the intention of J.M. to file a petition with the United States Supreme Court in the next couple of weeks asking that the court review the rights of the child. But Justice Scalia's clarification of the current law, which corroborates the position that the plaintiff has taken throughout this case, has application to J.M.'s individual rights. Much of the rights of J.M. depend upon the nature of the life of the child. In addition, as is set forth in the last portion of this point heading, part of J.M.'s individual rights is his own standing to raise and protect the rights of his child. The existence of the child and whether the child has rights under the Federal Constitution as well as under the State constitution can be raised by J.M. We raise them on this motion and in the context of J.M.'s individual claim not only to preserve our record for future appeal, but because they have application even on the trial level in ruling on J.M.'s individual rights, his individual right to raise his child's rights, and whether his child has any rights. All of these issues he is entitled to litigate himself and any rulings made adverse to the child are not res adjudicata against himself. We agree with Judge Shebell in his dissent that to some extent, law is laws in a State of flux; but only to the extent of the federal question concerning the individual rights of the unborn child. We

believe a correct interpretation of the current law, requires the conclusion that the Fourteenth Amendment protects the unborn child. However, there is clearly no state of flux with respect to the rights of J.M. individually, under Federal law, or under State law.

A. NEW JERSEY LAW AND POLICY REQUIRES THE PROTECTION OF THE LIFE OF THE UNBORN CHILD AT THE REQUEST OF A NATURAL PARENT.

New Jersey law provides protection of the life of the unborn child. There are essentially five areas of policy and policy concern, under New Jersey law, which requires the protection of the life of the unborn child.

1. NEW JERSEY RECOGNIZES AN UNBORN CHILD AS AN INDIVIDUAL TO WHOM OTHERS OWE A DUTY, WHICH THE STATE WILL COMPEL PEOPLE TO DISCHARGE.

New Jersey recognizes that an unborn child is an individual and separate human being from its mother while still in the mother's womb. Smith v. Brennan, 31 N.J. 353, 362, 363 (1960). In Smith v. Brennan, the New Jersey Supreme Court stated:

> "They have found that the existence of an infant separate from its mother begins before birth, (citations omitted). Medical authorities have long

> recognized that a child is in existence from the moment of conception and not really a part of its mother's body (citations omitted)."

In Smith the Supreme Court cited with approval the following language from the dissent of Justice Brogan in the case of Stemmer v. Kline:

> "'While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart of the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother, but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.' 128 N.J.L. at page 466."

The Supreme Court, in ruling for the first time in the jurisdiction of New Jersey that physicians owe a duty to the unborn child and can be held liable when the duty to the unborn child is breached, stated:

> "From the foregoing it is clear that medical authorities recognized that before birth an infant

> is a distinct entity, and that the law recognizes that rights that he will enjoy when born can be violated before his birth."

One of these rights is the right to life itself. Art. I, Sec. I.

In Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 423 (1964), the New Jersey Supreme Court found that the State had an interest in protecting the life of an unborn child. The court found that the right was personalized to the life of the unborn child and appointed a guardian ad litem. 42 N.J. at 423, 424. The health of the child was protected while the child was in its mother's womb even over the objection of the baby's mother. The duty the parents owed to the child was recognized in the law and could not be subjugated to the religious beliefs of the parents.

In the absence of Roe v. Wade the New Jersey Supreme Court has declared that abortion is against the public policy of the State of New Jersey, and that New Jersey has an interest in protecting the life of the unborn child. Raleigh Fitkin v. Anderson, supra; Gleitman v. Cosgrove, 49 N.J. 22 (1967); Berman v. Allen, 80 N.J. 421, 429 (1979).

The public policy expressed in both Gleitman and Berman emphasized New Jersey's commitment to life and its protection

especially in the context of the unborn child. See the discussion at IIIPb40-1 to IIIPb41-17.

The right of a woman to abort a child referred to in the New Jersey Supreme Court case of Right to Choose v. Byrne, 91 N.J. 287 (1982) is not contrary to the cases cited here. Byrne was referring to the Federal Constitutional right annunciated in Roe v. Wade. It did not establish a constitutional right under New Jersey law, nor could it. That right is contrary to New Jersey law. Byrne is no longer viable law in view of the changes found in Webster and subsequent cases cited above.

2. ABORTION OF A CHILD VIOLATES NEW JERSEY'S PUBLIC POLICY THAT ARISES FROM THE GOVERNMENT'S DUTY TO PROTECT THE SAFETY, HEALTH, MORAL AND GENERAL WELFARE OF ITS CITIZENS.

Our State government was "instituted for the protection, security and benefit of the people." N.J. Const. (1947), Art. I, Sec. 2. It has an inherent duty to protect the safety, health, moral and general welfare of the people. Indeed this duty is at the heart of why governments are formed. This duty extends to the protection of all citizens and it is the essence of the police power of the State. See 16 C.J.S. Constitutional Law, Sec. 432 at 389

(1984). The Judiciary in New Jersey has recognized that it has an independent obligation in regard to this duty. The prevailing concepts as to how the government should go about performing this duty define important public policies. See Allen, 131 N.J. Law at 478. It is well established the State has an interest in protecting the welfare of children within its borders and in the exercise of its parens patriae powers, has a duty to see that every child receives proper care and treatment. 43 C.J.S. Infants, Sec. 5 at 67 (1978); See D.Y.F.S. v. A.W., 103 N.J. 591 (1986); See Johnson v. State, 18 N.J. 422, 430 (1955), cert. den. 355 U.S. 942, 76 S.Ct. 318, 100 L.Ed. 822 (1956).

The affidavits submitted to the court demonstrates that an abortion is a painful and brutal death of a defenseless member of the human race. To the extent that a trial in this case would establish that many of the unborn children who are subjected to abortions, are subjected to unbearable pain, it is clear that not only the death itself, but the method of death is against the policy of the State.

No civilized State or Nation could seriously contend that it is not in its interest to prevent the death of human beings in this fashion. In discharging the State's obligation to protect the health

and welfare of children, it is incumbent upon this State to rule in favor of a father who seeks to protect the child from such a fate.

3. PERMITTING AN ABORTION OVER THE OBJECTIONS OF THE FATHER IS CONTRARY TO THE POLICY OF THE STATE OF NEW JERSEY WHICH BASES ITS DECISIONS CONCERNING THE CHILD'S WELFARE UPON THE BEST INTERESTS OF THE CHILD.

It is undisputed that the policy of the State of New Jersey that the rights of parents with respect to their children are always based upon what is in the child's best interest. Fantony v. Fantony, 21 N.J. 525, 536 (1956); In the Matter of Baby M, 109 N.J. 396 (1988). When a father seeks to assert his own rights, and a mother seeks to assert what she perceives to be hers, the deciding factor, when the life of a child is held in the balance, is what is in the best interest of the child. Harming any child over the objections of the natural parent is against the policy of the State and requires the court to rule in favor of the father's assertion of his rights in this case.

4. AN ABORTION IS CONTRARY TO THE POLICY OF THE STATE OF NEW JERSEY THAT WE DON'T TERMINATE PARENTAL RIGHTS UNLESS THERE IS A SHOWING OF ABANDONMENT OR NEGLECT.

It is the policy of the State of New Jersey that the parental rights of a parent is not terminated unless there is a showing of abandonment or neglect. D.Y.F.S. v. A.W., 103 N.J. 591 (1986); Sees v. Barber, 74 N.J. 201 (1977); In the Matter of Baby M, 109 N.J. 396 (1988).

When one parent, who has neither abandoned nor neglected his child seeks to preserve the possibility that he have custody of the child, the State must preserve the life of the child over the objections of the mother. The father in this case has acted admirably for one under the circumstances. He seeks what is only best for his child and a ruling in favor of the parent is worse than termination of his parental rights: it is actually the State's involvement in the taking of the life itself of the child. Such an act on the part of the State is contrary to this State's policy and law.

In the Matter of Baby M, supra, a father sought to terminate the parental rights of a mother based upon a private contract. The father maintained that the State of New Jersey had no power to interfere with the wishes of a couple found in the contract (even though the mother later objected). The New Jersey Supreme Court found the contract unenforceable and void ab initio. Here a mother states that she may more than unilaterally terminate the

rights of the father without his agreement - she asserts a right to terminate the life of the child him or herself. Such an act is contrary to our policy and therefore the father's rights can be preserved through injunctive relief.

5. GRANTING THE MOTHER AN ABORTION IS AGAINST NEW JERSEY'S POLICY, WHICH EXTENDS THE RIGHT TO PARENTS TO PROTECT THE LIFE OF THEIR CHILDREN.

As we have seen it is the policy of the State of New Jersey to protect life. Berman v. Allen, supra; New Jersey Constitution, Art. I, Sec. 1. It being a policy of this State to permit its citizens to protect life, especially parents to protect the life of their own children, granting an abortion to the defendant would be a violation of that law and policy.

B. PART OF J.M.'S CONSTITUTIONAL RIGHTS IS HIS RIGHT TO RAISE SUBSTANTIVE CLAIM OF HIS OWN CHILD. HE HAS "STANDING" TO LITIGATE HIS CHILD'S SUBSTANTIVE RIGHTS AS PART OF HIS OWN CLAIM.

Part of J.M.'s own constitutional rights is that he has the standing to raise the rights of his child. All of the constitutional rights set forth in the briefs before the court filed by J.M. must by necessity include this additional right. Because he is a separate person and a separate litigant from the unborn child, he also has

the right to litigate the very question of whether the child has his or her own constitutional rights. This necessarily flows from the question of his standing to raise the child's rights. If the child has no rights then he would have no standing. To preserve the record on further review he asserts both his right to have standing as well as his child's rights. In view of the comments of Justice Scalia, on April 22, 1992, as set forth above, he is entitled to make a proper record on the child's own rights under New Jersey law (and Federal Law) as a necessary and integral part of the legal question of whether he has the standing to raise his child's rights.

CONCLUSION

Defendant V.C.'S reliance upon Planned Parenthood v. Danforth is based upon a misconstruc-tion of the decision and a misinterpretation of current law. The issue of the father's rights, as presented in the current case, has never before been decided by the united states supreme court. This case presents issues that were not present in danforth and a majority of danforth recognized that the father of an unborn child possesses constitutional rights.

Extending an exclusive decision making power concerning the life of the unborn child to a mother is a denial of J.M.'S own constitutional rights and a denial to him of the equal protection of the laws.

Because a state has a compelling interest in protecting the life of an unborn child throughout pregnancy, new jersey has the power to rule in favor of J.M. Who seeks protection for the life of his child. Without the compulsion of the original decision of Roe v. Wade, New Jersey law clearly provides for the best interest of the child and supports the father who seeks to preserve the life of his child.

Respectfully submitted,

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By:_____
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